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THE GENERAL STATUTES OF NORTH CAROLINA

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1983 CUMULATIVE SUPPLEMENT

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Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
D. P. HARRIMAN, S. C. WILLARD, W. L. JACKSON
AND K. S. MAWYER

Volume 4A

1970 Replacement

Annotated through 303 S.E.2d 102. For complete scope of annotations, see scope of volume page.

Place with Corresponding Volume of Main Set. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Scope of Volume

Constitutions:

Amendments to the Constitution of North Carolina.

Amendment to the Constitution of the United States ratified in 1971.

Rules:

The North Carolina Rules of Appellate Procedure, the General Rules of Practice for the Superior and District Courts, the Order Concerning Electronic Media and Still Photography Coverage of Public Judicial Proceedings, the rules of practice in the United States District Courts for the Middle, the Eastern and the Western Districts of North Carolina, orders of the United States Bankruptcy Court for the Middle District of North Carolina, rules for the United States Bankruptcy Court for the Western District of North Carolina, rules as to removal of causes from state courts to district courts of the United States, federal rules as to authentication of records, the State of North Carolina Extradition Manual, the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, the Rules, Regulation and Organization of the North Carolina State Bar, the Code of Professional Responsibility of the North Carolina State Bar, the Code of Judicial Conduct, Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, Rules Governing Admission to the Practice of Law, Rules Governing Practical Training of Law Students, and the North Carolina Supreme Court Library Rules.

Annotations:

Sources of the annotations to the North Carolina Constitution and to the Rules of Appellate Procedure and Rules of Practice for the Superior and District Courts:

South Eastern Reporter 2nd Series through Volume 303, p. 102.

Federal Reporter 2nd Series through Volume 707, p. 523.

Bankruptcy Reports through Volume 29, p. 815.

Federal Supplement through Volume 562, p. 911.

Federal Rules Decisions through Volume 97, p. 544.

Supreme Court Reporter through Volume 103, p. 2468.

North Carolina Law Review through Volume 61, p. 744.

Wake Forest Law Review through Volume 19, p. 150.

Campbell Law Review through Volume 5, p. 262.

Duke Law Journal through 1983, p. 195.

North Carolina Central Law Journal through Volume 13, p. 282.

Opinions of the Attorney General.

Tables.

Preface

This Cumulative Supplement to Replacement Volume 4A contains amendments and supplementary annotations to the Constitution of North Carolina, an amendment to the Constitution of the United States, and amendments and supplementary annotations to the rules and other matters within the scope of the volume. It also contains a table of the general laws enacted by the General Assembly at the 1971 Regular Session through the 1983 Regular Session and the 1983 Extra Session.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Table of Contents

PAGE

Constitution of North Carolina 9
Constitution of the United States 121
Appendix.
I. Rules of Practice in the General Court of Justice 123
(1) [Superseded] 123
(2) [Superseded] 124
(2A) North Carolina Rules of Appellate Procedure 125
(3) [Rescinded] 228
(4) [Superseded] 229
(5) General Rules of Practice for the Superior and District Courts 230
I-A. Order Concerning Electronic Media and Still Photography Coverage of Public Judicial Proceedings 237
II. Rules of Practice in United States District Courts and Bankruptcy Courts 241
(1) United States District Court for the Middle District of North Carolina 241
(1A) United States Bankruptcy Court for the Middle District of North Carolina 268
(2) United States District Court for the Eastern District of North Carolina 270
(2A) United States Bankruptcy Court for the Eastern District of North Carolina 314
(3) United States District Court for the Western District of North Carolina 315
(3A) United States Bankruptcy Court for the Western District of North Carolina 338
III. Removal of Causes 347
IV. Authentication of Records 351
V. Extradition 353
V-A. Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission 399
VI. Rules, Regulations and Organization of the North Carolina State Bar 401
VII. Code of Professional Responsibility of the North Carolina State Bar 429
VII-A. Code of Judicial Conduct 483
VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases 493
IX. Rules Governing Admission to Practice of Law 495
IX-A. Rules Governing Practical Training of Law Students 515
X. North Carolina Supreme Court Library Rules 521
XI. Comparative Tables 525
(4) Table of Laws Codified Subsequent to 1919 525
(6) Table of Comparable Sections for Chapters 153A and 153 721

The General Statutes of North Carolina

1983 Cumulative Supplement

VOLUME 4A

Constitution of North Carolina

Article II.

Legislative.

Sec.
9. Term of office.

Article III.

Executive.

2. Governor and Lieutenant Governor: election, term, and qualifications.
5. Duties of Governor.

Article IV.

Judicial.

8. Retirement of Justices and Judges.
12. Jurisdiction of the General Court of Justice.
17. Removal of Judges, Magistrates and Clerks.
18. District Attorney and prosecutorial districts.
22. Qualification of Justices and Judges.

Article V.

Finance.

1. No capitation tax to be levied.
2. State and local taxation.
3. Limitations upon the increase of State debt.
4. Limitations upon the increase of local government debt.
5. Acts levying taxes to state objects.

Sec.
6. Inviolability of sinking funds and retirement funds.
7. Drawing public money.
8. Health care facilities.
9. Capital projects for industry.
10. Joint ownership of generation and transmission facilities.

Article VI.

Suffrage and Eligibility to Office.

1. Who may vote.
6. Eligibility to elective office.

Article VII.

Local Government.

1. General Assembly to provide for local government.

Article X.

Homesteads and Exemptions.

2. Homestead exemptions.
5. Insurance.

Article XIV.

Miscellaneous.

3. General laws defined.
5. Conservation of natural resources.

ARTICLE I

DECLARATION OF RIGHTS

Section 1. The equality and rights of persons.

Legal Periodicals. — For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

This section guarantees the right to pursue ordinary and simple occupations free from governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Human fetus is not a "person" within the meaning of this section and N.C. Const., Art. I, § 19, and the protections of these sections thus do not apply to the fetus so as to prohibit State funding for elective abortions. Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), rev'd on other grounds, 302 N.C. 357, 275 S.E.2d 439 (1981).

A human fetus is not a "person" within the protection guaranteed by this section and Art. I, § 19, of the Constitution of North Carolina and State funding of elective abortions does not violate Art. V, § 5. Stam v. State, 302 N.C. 357, 275 S.W.2d 439 (1981).

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or that it impairs the right to contract. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

The amendment to § 93A-2(a) enacted by Session Laws 1975, c. 108, is unconstitutional as repugnant to Art. I, §§ 1 and 19, of the Constitution of North Carolina. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Applied in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. Willis, — N.C. App. —, 300 S.E.2d 420 (1983).

Quoted in In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

Sec. 2. Sovereignty of the people.

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

All power which is not limited by the Constitution inheres in the people. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Acts Legal Unless Prohibited. — An act of the General Assembly is legal when the Constitution contains no prohibition against it. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Exchange of Land by Board of Education. — There is nothing in the Constitution which prohibits the board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

Sec. 6. Separation of powers.

Legal Periodicals. — For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For comment on sectarian education and the state, see 1980 Duke L.J. 801.

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

For article discussing limitations on ad hoc adjudicatory rulemaking by an administrative agency, see 61 N.C.L. Rev. 67 (1982).

For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Generally. —

The legislature may not abdicate its power to make laws nor delegate its supreme legislative power to any other coordinate branch or to any agency which it may create. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Effect of Section. — The effect of this section and N.C. Const., Art. II, § 1 is to elucidate the circumstances in which delegation of legislative powers is permissible. Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979), aff'd, 299 N.C. 399, 263 S.E.2d 726 (1980).

Principle Is Well Established. — The principle of separation of powers was clearly in the minds of the framers of the Constitution; and the people of North Carolina, by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, are firmly and explicitly committed to the principle. Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Classification of Departments Is Not Exact. — Although this State is firmly committed to the doctrine of separation of powers, the classification cannot be very exact, and there are many officers whose duties cannot be exclusively arranged under the duties of either of the judicial, legislative or executive heads. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Power May Be Delegated to Municipalities. — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

Legislature May Delegate Limited Legislative Power to Administrative Bodies. — A modern legislature must be able to delegate — in proper instances — a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the legislature cannot deal directly. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The principle that the General Assembly may not delegate its power to any other department or body, is not absolute. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

When Legislature May Delegate Legislative Power to Administrative Agency. — As to some specific subject matter, the legislature may delegate a limited portion of its legislative power to an administrative agency if it prescribes the standards under which the agency is to exercise the delegated powers. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The need to delegate a limited portion of legislative powers in order to effectively utilize administrative expertise must be reconciled with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

The function of the court is to insure that the decision-making by the administrative agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices that might just as easily be made by the legislature. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Necessity for Adequate Standards when Delegating Power. — The constitutional inhibition against delegating legislative authority

does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The test of constitutional delegation of legislative power is whether the delegation is accompanied by adequate guiding standards; if so, the delegation will be upheld. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Purpose of Adequate Guiding Standards Test. — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Application of Test. — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Relevant circumstance in determining whether particular delegation of authority is supported by adequate guiding standards is to consider whether the authority vested in the agency is subject to procedural safeguards. This aids in insuring that the agency's decision-making is not arbitrary and unreasoned. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Specificity of Legislative Goals. — Goals and policies set forth by legislature for an agency to apply in exercising its powers need be only as specific as the circumstances permit. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Sources for Standards. — In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. Such declarations need be only as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision-making by the agency is not arbitrary and unreasoned. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Proper to Delegate Authority to Plan and Construct Interstate Highway. — The delegation of authority to the North Carolina Department of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority to an administrative body which was unrestrained by legislative standards or sufficient procedural safeguards or political accountability in violation of this section and N.C. Const., Art. II, § 1. Orange County Sensible Hwys. & Protected Environments, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

And to Regulate Dredging or Filling In Estuarine Waters. — There are adequate statutory guidelines and procedural safeguards relating to the authority of the Department of Natural Resources and Community Development and the review commission to deny an application for a permit to dredge or fill in estuarine waters pursuant to § 113-229(e)(2) upon finding "that there will be significant adverse effect on the value and enjoyment of the property of riparian owners," so that § 113-229(e)(2) does not constitute an unlawful delegation of legislative power in violation of

this section. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Legislative Change of Court Jurisdiction. — The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Judicial Functions in Criminal Cases. — The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Manner and Mitigation of Punishment Are Legislative Functions. — The manner of executing a sentence and the mitigation of punishment are determined by the legislative department, and what the legislature has determined in that regard must be put in force and effect by administrative officers. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Legislature May Establish Parole System. — In the division of governmental authority the legislature has exclusive power to determine the penalogical system of the State. It alone can prescribe the punishment for crime. It may therefore establish a parole system. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting, withholding or frustration of the parole power is not and has never been a responsibility of the judicial branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

And Administration of Parole System May Be Delegated. — The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be entrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Petitioner's contention, that the legislature had provided no standards to guide the Board of Paroles in determining whether a parole violator should serve his original sentence concurrently with his new sentence or at the completion of it and that this failure nullified the purported grant of authority under former § 148-62, could not be sustained. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Assignment of Discretionary Power to Parole Commission. — Former § 148-62, insofar as it grants discretionary power to the Board of Paroles, (now the Parole Commission), is not an assignment of judicial power to the Board of Paroles in contravention of N.C. Const., Art. IV, § 1 and this section. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

The sentencing process may not be expressly employed to thwart the parole process, the responsibility for which is vested in another branch of government. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Release of a prisoner before completion of his sentence cannot and should not be anticipated with exactness by the trial judge as the basis for the imposition of sentences in cases. State v. Snowden, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975).

Discretionary Right to Enlarge Corporate Limits. — In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in a special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. II, § 1, or this section. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

Applied in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

Quoted in Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), modified, 292 N.C. 1, 231 S.E.2d 867 (1977); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Rogers, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

Sec. 8. Representation and taxation.

Legal Periodicals. — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

CASE NOTES

Applied in Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 381 (1982).

Cited in In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976); Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 11. Property qualifications.

CASE NOTES

Quoted in Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979).

Cited in State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Sec. 12. Right of assembly and petition.

CASE NOTES

City Parade Ordinance Constitutional. — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

Cited in City of Winston-Salem v. Chauffers Local 391, 470 F. Supp. 442 (M.D.N.C. 1979).

Sec. 13. Religious liberty.

Legal Periodicals. — For note on state regulation of public solicitation for religious purposes, see 16 Wake Forest L. Rev. 996 (1980).

For a comment, "The State and Sectarian Education: Regulation to Deregulation," see 1980 Duke L.J. 801.

CASE NOTES

Secular Neutrality Mandated. — Construed together, this section and Art. I, § 19 of this State's Constitution and the First Amendment may be said to coalesce into a singular guarantee of freedom of religious profession and worship, as well as an equally firmly established separation of church and state. The legislature oversteps the bounds of this separation when it enacts a regulatory scheme which, whether in purpose, substantive effect, or administrative procedure, tends to "control or interfere" with religious affairs, or to "discriminate" along religious lines, or to constitute a law "respecting" the establishment of religion. Stated simply, the constitutional mandate is one of secular neutrality toward religion. Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980).

The legal tribunals of the State, etc. — In accord with original. See Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973).

How Civil Courts Must Decide Church Property Disputes. — Civil courts must decide church property disputes without inquiring into underlying controversies over religious doctrines and without in any way basing decision upon any determination made upon such an inquiry. Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101, aff'd, 284 N.C. 306, 200 S.E.2d 641 (1973).

In a child custody proceeding, the trial court cannot base its findings on the preferability of any particular faith or religious instruction. Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

The spiritual welfare of a child is a factor that may be considered by the trial court in making a custody determination. Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

Applied in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979).

Cited in Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

OPINIONS OF ATTORNEY GENERAL

Separation of Church and State; Health; Mental Health; Community Pastoral Counseling Program. — See opinion of Attorney General to Mr. Patrick Guyton, Community Development Specialist, Department of Human Resources, 43 N.C.A.G. 189 (1973).

Sec. 14. Freedom of speech and press.

Legal Periodicals. — For article analyzing the evolution of first amendment speech rights in North Carolina, see 4 Campbell L. Rev. 243 (1982).

CASE NOTES

Right to Comment on Matters of Public Interest. — Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Such Comments Not Libelous Unless Written Maliciously. — Such comments or criticisms are not libelous, however severe in their terms, unless they are written maliciously. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

This section is viewed in the light of the doctrine of "qualified privilege." Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

The basis of privilege is the public interest in the free expression and communication of ideas. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Recovery for Defamation Not Allowed Where Public Interest Outweighs State's Interest. — Where this public interest is sufficient to outweigh the interest of the State in protecting the individual or corporate plaintiff from damage to his or its reputation, social or business relationships, the law does not allow recovery of damages, actual or punitive, occasioned by the defamatory speech or publication. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

When Qualified Privilege Is Applicable. — Qualified privilege will apply to a statement

made or article written in good faith, without actual malice, (as defined by the law of North Carolina), touching upon a topic in which the speaker or publisher has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Is Question of Law. — Whether a publication is privileged is a question of law to be determined by the court. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Qualified Privilege Not Extended to Sports Reporting. — The North Carolina courts have not, as of yet, extended the doctrine of qualified privilege to the field of sports reporting, nor is there any indication that they will do so in the future. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Malice Necessary to Overcome Qualified Privilege Distinguished from "Actual Malice". — The malice necessary under North Carolina law to overcome the shield of qualified privilege should not be confused with the "actual malice" standard which has been developed from the First Amendment, freedom of the press, decisions under the United States Constitution. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

North Carolina equates actual malice with reckless or careless publication. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Falsehood of Statement Not Sufficient to Establish Malice. — In cases of qualified privilege, the falsehood of the statement will not of itself be sufficient to establish malice, for there is a presumption that the publication was made bona fide. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Commercial Speech Subject to Reasonable Time, Place and Manner Restrictions. — While it is true that commercial speech is protected under the First Amendment of the United States Constitution, and similarly under this section, it is nonetheless true that commercial speech, like other varieties of speech, is subject to reasonable time, place, and manner restrictions. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

Balance Between Freedom of Press and Fair Trial Right. — The framers of the federal and state constitutions gave no priorities to the fundamental guarantees of freedom of speech and of the press and the guarantee that every criminal defendant shall receive a fair trial, but left to the courts the delicate task of balancing the defendant's constitutionally guaranteed right to a fair trial against the constitutional guarantees of freedom of speech and freedom of the press. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Burden of Justifying "Gag" Rule. — Even pervasive, adverse publicity does not inevitably lead to an unfair trial, and any prior restraint on expression comes to the courts with a heavy presumption against its constitutional validity; thus, one seeking to impose a "gag" rule carries a heavy burden of showing justification for the imposition of such a rule. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

County Sign Ordinance Valid. — Provisions of a county sign ordinance do not infringe upon defendants' rights of free speech where the ordinance does not attempt to censor the content of signs or to impose any prior restraints on expressions of any kind. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

City Parade Ordinance Constitutional. — Where a city's parade ordinance was codified under the general heading of traffic, its language was directed to the time, place and manner of parades, and it neither imposed restraint upon speech concerning political matters or matters of public concern nor contained any inkling of discrimination against defendant, who was arrested for participating in a parade without a permit, the ordinance was constitutionally valid. State v. Frinks, 284 N.C. 472, 201 S.E.2d 858 (1974).

Unprotected Action. — Defendant's accosting of customers in a private parking lot at a privately owned and operated mall to sign a petition, which was a type of solicitation prohibited by the owners of the mall, was not an exercise of free speech protected by the First Amendment to the United States Constitution or by this Article of the North Carolina Constitution. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Applied in Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982).

Cited in Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); State v. Johnson, 304 N.C. 680, 285 S.E.2d 792 (1982).

Sec. 15. Education.

Legal Periodicals. —

For article analyzing the evolution of first amendment speech rights in North Carolina, see 4 Campbell L. Rev. 243 (1982).

For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

CASE NOTES

Mandate of Section. — The provisions of this section and N.C. Const., Art. IX, § 2(1), with the activating statutes, embody mandates for the establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and "the duty of the State to maintain and guard that right," while guaranteeing equal opportunities to all students. Webster v. Perry, 512 F.2d 612 (4th Cir. 1975).

Fee waiver policy adopted by city board of education was unconstitutional where it failed to establish mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

Quoted in Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

Cited in Poovey v. Edmisten, 526 F. Supp. 759 (E.D.N.C. 1981).

Sec. 16. Ex post facto laws.

CASE NOTES

Section Applies to Legislative, Not Judicial Action. — There is no violation of the ex post facto clause in the Constitution of this State when a decision is applied retroactively because the clause applies to legislative and not judicial action. A party has no vested right in a decision of this State's Supreme Court. State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980); State v. Funderburk, 56 N.C. App. 119, 286 S.E.2d 884 (1982).

Applies Only to Criminal Statutes. —

Constitutional prohibitions of ex post facto legislation apply only to criminal proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

An upward change of criminal penalty by legislative action cannot constitutionally be applied retroactively. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Where the punishment at the time of the offense was death or life imprisonment in the discretion of the jury, a change by the legislature to death alone would be ex post facto as to such offenses committed prior to the change. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Any legislation which increases the punishment for a crime between the time the offense was committed and the time a defendant is punished therefor is considered an invalid ex post facto law as applied to that defendant. State v. Wright, 302 N.C. 122, 273 S.E.2d 699 (1981).

Neither Can Increase by Judicial Action. — While the letter of the ex post facto clause is addressed to legislative action, the constitutional ban against the retroactive increase of punishment for a crime applies as well against judicial action having the same effect. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Doctrine Inapplicable to Attorney Disciplinary Proceedings. — The doctrine of ex post facto laws does not apply to attorney disciplinary proceedings. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1982).

Applied in In re Stedman, 305 N.C. 92, 286 S.E.2d 527 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982).

Cited in State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977).

Sec. 17. Slavery and involuntary servitude.

CASE NOTES

Cited in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972); State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); Williams v. Town of Grifton, 19 N.C. App. 462, 199 S.E.2d 288 (1973); Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

Sec. 18. Courts shall be open.

Legal Periodicals. — For note on criminal defendants' rights during sentencing, see 50 N.C.L. Rev. 925 (1977).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

CASE NOTES

Scope and Effect. —

This section guarantees access to the courts to those who have claims but it does not in all cases forbid the General Assembly from defining or abolishing claims which arise under the common law. Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982).

This section guarantees access to the courts for redress of injuries. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), aff'd, 306 N.C. 364, 293 S.E.2d 415 (1982).

This section guarantees to those who suffer injury to their persons, property, or reputation, the right to seek redress therefor in the courts of this State; any law which attempts to deny that right runs afoul of this guarantee. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), aff'd, 306 N.C. 364, 293 S.E.2d 415 (1982).

Remedy Must Be Legally Cognizable. — The "remedy" constitutionally guaranteed "for an injury done" is qualified by the words "by due course of law." This means that the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not. Lamb v. Wedgewood S. Corp., — N.C. —, 302 S.E.2d 868 (1983).

Right to Speedy Trial. — Every person formally accused of crime is guaranteed a speedy and impartial trial by this section and the Sixth and Fourteenth Amendments of the federal Constitution. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Prisoners confined for unrelated crimes are entitled to the benefits of the constitutional guaranty of a speedy and impartial trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Time Period Involved in Right to Speedy Trial. — The right to a speedy trial pertains to the time period between the date of the occurrence of the alleged crime and the date when a defendant is "accused" of committing that crime, and an individual becomes "accused" of a crime for the purpose of calculating the length of this delay when he is either arrested or indicted. State v. Salem, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

Unless some fixed time limit is prescribed by statute, speedy trial questions must be resolved on a case-by-case basis. While all relevant circumstances must be considered, four interrelated factors are of primary significance: (1) the length of delay, (2) the reason for the delay, (3) the extent to which defendant has asserted his right and (4) the extent to which defendant has been prejudiced. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Foreign Custody and Absence of Prejudice As Factors in Denying Speedy Trial Violation. — Defendant was not denied his right to a speedy trial by the delay between his indictment in November 1977 and his trial in July 1979 where he was either in federal custody or in custody in South Carolina except from February to September 1978 and March to July 1979, and the remaining time fell short of denying defendant his constitutional right to a speedy trial because there was no evidence that any of the delay for which the State of North Carolina was responsible prejudiced his case or his ability to present his defense. State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Defendant Causing Delay Not Denied Speedy Trial. — A criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

But the constitutional guarantee of a speedy trial does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Right Must Be Asserted. — Failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

The defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. State v. Tindall, 294 N.C. 689, 242 S.E.2d 806 (1978).

Waiver. — This right is not absolute. While every reasonable presumption will be indulged against a waiver of fundamental constitutional rights by a defendant in a criminal prosecution, a defendant may waive the benefit of constitutional guarantees by express consent, failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981).

Indictment, Arraignment and Trial on Same Day. — Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the burglary indictment, since defendant by not contesting indictments for armed robbery, larceny and rape conceded that he had been given sufficient time in which to prepare a defense on these charges; the burglary indictment arose out of the same series of events which led to the three other indictments; the offenses took place at such a close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape; and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

The public, and especially the parties, are entitled to see and hear what goes on in the court. That courts are open is one of the sources of their greatest strength. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Clearing Courtroom During Testimony of Child Rape Victim. — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to § 15-166 that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the state's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

Offenses Against Judicial System. — A person who commits an act of embracery is liable in civil damages to one who is damaged thereby. Employers Ins. v. Hall, 49 N.C. App. 179, 270 S.E.2d 617 (1980), cert. denied, 301 N.C. 720, 276 S.E.2d 283 (1981).

Applied in In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979).

Quoted in McLean v. Sale, 38 N.C. App. 520, 248 S.E.2d 372 (1978); Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368 (1980); Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981).

Cited in State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979).

Sec. 19. Law of the land; equal protection of the laws.

Legal Periodicals. — For note on statutory requirement of safety helmets for motorcyclists, see 6 Wake Forest Intra. L. Rev. 349 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For a note on physical restraints on defendant during trial, see 13 Wake Forest L. Rev. 231 (1977).

For a note on the use of state constitutional law to void occupational licensing statutes which unreasonably restrict freedom of occupational choice, see 13 Wake Forest L. Rev. 507 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For note on state regulation of public solicitation for religious purposes, see 16 Wake Forest L. Rev. 996 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

CASE NOTES

I. GENERAL CONSIDERATION.

"Liberty". — The term "liberty" is as extensive as is the same term used in the Fourteenth Amendment to the Constitution of the United States. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Under this section no person can be deprived, etc. —

This section provides that no person may be deprived of his property except by the law of the land, or expressed another way, except by due process of law. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

What Constitutes "Law of the Land". —

In accord with 3rd paragraph of original. See State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The "law of the land" requires that the administration of justice be consistent with the fundamental principles of liberty and justice. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Among other things "the law of the land" or "due process of law" imports both notice and the opportunity to be heard before a competent tribunal. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976); Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

"Law of the Land" Has Same Meaning as "Due Process of Law". — The expression "the law of the land," has the same meaning as the expression "due process of law." Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

The law of the land and due process of law are interchangeable terms. Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L. Ed. 2d 636 (1974).

The term "law of the land" as used in this section is synonymous with "due process of law" as used in the Fourteenth Amendment to the federal Constitution. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

"Due process" has a dual significance, etc. —

In accord with original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

In substantive law, due process, etc. —

In accord with original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

A decision of the Supreme Court of the United States construing the due process clause of the Fourteenth Amendment to the federal Constitution, though persuasive, does not control an interpretation by the Supreme Court of North Carolina of the law of the land clause in the Constitution of North Carolina. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Principle of Equal Protection Expressly Incorporated. — The principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States has now been expressly incorporated in this section of the Constitution of North Carolina. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Two-tiered Equal Protection Analysis. — Courts employ a two-tiered scheme of analysis when an equal protection claim is made. When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny," this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest. When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

Equal Protection Extends to Persons, Not Rights. — The argument that the amended § 50-6 violates equal protection by preserving a dependent spouse's right to alimony without at the same time preserving all other property rights incident to continuation of the marital status is beside the mark. The equal protection clauses of the State and federal

Constitutions prohibit the denial of the equal protection of the laws to persons, not to rights. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Human fetus is not a "person" within the meaning of this section and N.C. Const., Art. I, § 1, and the protections of these sections thus do not apply to the fetus so as to prohibit State funding for elective abortions. Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), rev'd on other grounds, 302 N.C. 357, 275 S.E.2d 439 (1981).

A human fetus is not a "person" within the protection guaranteed by Art. I, § 1 and this section, of the Constitution of North Carolina and State funding of elective abortions does not violate Art. V, § 5, of the Constitution of North Carolina. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

Scope of Police Power of State and Liberty of Individual. — The police power of the State extends to all the compelling needs of the public health, safety, morals and general welfare. Likewise, the liberty protected by the law of the land clause of the State Constitution extends to all fundamental rights of the individual. It is the function of the courts to establish the location of the dividing line between the two. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

The State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety and general welfare of society. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Any exercise by the State of its police power is a deprivation of liberty. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

The limit of the police power is the reasonable necessity for the action in order to protect the public. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Whether a statute is a violation of the law of the land clause or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a public good, or to prevent the infliction of a public harm. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

The police power does not include power arbitrarily to invade property rights. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Means Chosen to Implement Object within Police Power. — Although the object of particular legislation may well be within the scope of the police power, the legislation may yet deprive individuals of due process of law if the means chosen to implement the legislative objective are unreasonable. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Equal protection clauses do not require perfection in respect of classifications. In borderline cases, the legislative determination is entitled to great weight. Lamb v. Wedgewood S. Corp., — N.C. —, 302 S.E.2d 868 (1983).

The legislature may make classifications, etc. —

Neither the equal protection clause of the Fourteenth Amendment to the United States Constitution nor the similar language in this section takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972); A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979); Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, — N.C. —, 302 S.E.2d 204 (1983); Lamb v. Wedgewood S. Corp., — N.C. —, 302 S.E.2d 868 (1983).

To withstand an equal protection claim a statute's classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Test Is Reasonableness in Relation to Purpose and Subject Matter. — The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, — N.C. —, 302 S.E.2d 204 (1983).

Classification Presumed Valid. — Although the reasonableness of a particular classification is a question for the court, there is a presumption that the classification is valid because such classifications are largely matters of legislative judgment. Therefore, a court may

not substitute its judgment of what is reasonable for that of the legislative body, particularly when the reasonableness of a particular classification is fairly debatable. Lamb v. Wedgewood S. Corp., — N.C. —, 302 S.E.2d 868 (1983).

The burden of establishing the unconstitutionality, etc. —

The party assailing the constitutionality of an ordinance must carry the burden of showing that the ordinance does not rest upon any reasonable basis, but is essentially arbitrary; and if any state of facts reasonably can be conceived that would sustain the ordinance, the existence of that state of facts at the time the ordinance was enacted must be assumed. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

Social Welfare Classifications Need Not Be Exact. — In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Validity Depends upon Reasonable Relation, etc. —

The test required by this section is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

The traditional equal-protection test does not require the very best classification in the light of a legislative or regulatory purpose; it does require that such classification in relation to such purpose attain a minimum (undefined and undefinable) level of rationality. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

The equal protection clauses of the United States and North Carolina Constitutions impose upon law-making bodies the requirement that any legislative classification be based on differences that are reasonably related to the purposes of the act in which it is found. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The validity of a Sunday closing statute or ordinance depends upon its reasonable relation to the accomplishment of the State's legitimate objective, which, in this instance, is the promotion of the public health, safety, morals and welfare by the establishment of a day of rest and relaxation. Legislation for this purpose, like other legislation, may not discriminate arbitrarily either as between persons, or groups of persons, or as between activities which are prohibited and those which are permitted. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

When a special class of persons, such as indigents, is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The equal protection clause of both the United States and the North Carolina Constitutions imposes upon law-making bodies the requirement that legislative classifications be based on differences that are reasonably related to the purposes of the act in which such are found and are not purely arbitrary. Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975), aff'd, 535 F.2d 1249 (4th Cir. 1976).

Legislative classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination and has some reasonable relation to the public peace, welfare and safety. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

When a special class of persons is singled out by the legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The traditional substantive due process test has been that a statute must have a rational relation to a valid State objective. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real or substantial relation to the public health, morals, order or safety or the general welfare. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

If statute is susceptible of two interpretations, one constitutional and the other unconstitutional, the former will be adopted. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

A municipal ordinance is presumed to be valid, and the burden is upon the complaining party to show its invalidity or inapplicability. And a municipal ordinance promulgated in the exercise of the police power will not be declared unconstitutional unless it is clearly so, and

every intendment will be made to sustain it. Currituck County v. Willey, 46 N.C. App. 835, 266 S.E.2d 52, cert. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

Ordinance on its face must be fair and impartial and must not permit unwarranted discrimination. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

Ordinance which vests unlimited or unregulated discretion in a municipal officer is void. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

Protection against Unreasonable Discrimination Extends to Administration and Execution of Laws. — The constitutional protection in this section against unreasonable discrimination under color of law is not limited to the enactment of legislation. It extends also to the administration and the execution of laws valid on their face. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971); Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

Actions of public officials are presumed to be regular and done in good faith. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

If a statute is so loosely and obscurely drawn as to be incapable of enforcement, it must be held void. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Application and Administration of Law with Unjust and Illegal Discrimination Is within Prohibitions of Constitution. — Though a law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Discriminatory administration of an ordinance is a denial of the equal protection of the law. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

But Mere Laxity in Enforcement Does Not Render Law Invalid. — Mere laxity, delay or inefficiency of the police department, or of the prosecutor, in the enforcement of a statute or ordinance, otherwise valid, does not destroy the law or render it invalid and unenforceable. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Even selective enforcement does not have that effect if it has a reasonable relation to the purpose of the legislation, such as making efficient use of police manpower by concentrating upon the major sources of the criminal activity. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Unless There Is Intentional or Purposeful Discrimination. — The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. Such discriminatory purpose is not presumed. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

The good faith of the enforcing officers is presumed. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

Actions of public officials are presumed to be regular and done in good faith. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

And Burden Is on Complainant to Show Intentional Discrimination. — The burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

The equal protection clauses of the United States Constitution and the Constitution of North Carolina require that in making classifications there be no discrimination, that is, there must be some reasonable relation between the class created and the legislative end to be obtained. Ledwell v. Berry, 39 N.C. App. 224, 249 S.E.2d 862 (1978), cert. denied, 296 N.C. 585, 254 S.E.2d 35 (1979).

State economic regulatory classifications need bear only a rational relationship to a legitimate governmental objective in order to withstand an equal protection challenge. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Burden is on challenger to show that actions as to him were unequal when compared to persons similarly situated. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

And It Is Not Sufficient to Show That Numerous Other Violators Have Not Been Prosecuted. — One who violates a law, valid upon its face, does not bring himself within the protection of the discriminatory administration rule merely by showing that numerous other persons have also violated the law and have not been arrested and prosecuted therefor. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

There is a presumption of honesty and integrity in those serving as adjudicators and a petitioner must demonstrate a risk of bias or prejudgment. In re Stuart, 59 N.C. App. 715, 297 S.E.2d 621 (1982).

Right to Counsel Not Strictly Limited to Criminal Proceedings. — The strict distinctions formerly drawn between criminal and civil actions are no longer valid, and due process presumptively requires the appointment of legal counsel to represent an indigent defendant if his actual imprisonment, or comparable confinement, is a likely result in the present proceeding concerned. Wake County ex rel. Carrington v. Townes, 306 N.C. 333, 293 S.E.2d 95 (1982), cert. denied, — U.S. —, 103 S. Ct. 745, 75 L. Ed. 2d 965 (1983).

Person who is not included in class against which there has been a discrimination cannot take advantage of the discrimination by pleading that the proceeding constitutes a violation of the equal protection guaranteed by the Fourteenth Amendment of the Constitution of the United States and by this section. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Equal access to participation in the public school system is a fundamental right, guaranteed by the State Constitution and protected by considerations of procedural due process. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

A license to engage in an occupation is a property right. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

The practice of law is a property right requiring due process of law before it may be impaired. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827, modified and aff'd, 304 N.C. 627, 286 S.E.2d 89 (1981).

This section guarantees the right to pursue ordinary and simple occupations free from governmental regulation. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Right to Engage in Lawful Business. — When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business, otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based upon this section. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

To deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service. Consequently, such a deprivation of his liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive his attack based upon this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Rights to Contract and Engage in Business Are Not Absolute. — Freedom to contract and engage in a lawful business activity are rights guaranteed by the State and federal constitutions. However, these rights are not absolute, and limitations thereon imposed by the legislature are not violative of the constitutional provisions so long as they are reasonable in light of the purposes to be accomplished. Louchheim, Eng & People, Inc. v. Carson, 35 N.C. App. 299, 241 S.E.2d 401 (1978).

The government may not revoke an occupational license except by due process of law. Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

A city ordinance which bestowed unbridled discretionary power upon the city council to grant or to refuse to grant a license to an individual, persons, associations or corporation to engage in the business of operating a restaurant, lunch counter, pressing club, moving picture show or market in the city violated the provisions of this section and the Fourteenth Amendment to the Constitution of the United States. Carolina Restaurants, Inc. v. City of Kinston, 32 N.C. App. 588, 233 S.E.2d 74 (1977).

Freedom to contract, etc. —

In accord with 2nd paragraph in original. See Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973).

Employment contract is not a sufficient proprietary interest to require full-scale constitutional protection in the form of a pretermination hearing. Maines v. City of Greensboro, 300 N.C. 126, 265 S.E.2d 204 (1980).

Sovereign immunity is not a defense to action against the State for breach of contract entered into by the State's authorized officers and agencies, since to deny the party who has performed his obligation under a contract the right to sue the State when it defaults is to take his property without compensation and thus to deny him due process. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment, but it can be restricted with due process of law. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Quarantine of Disaster Areas. — The constitutional protection of the freedom of travel does not mean that areas ravaged by

flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Due Process in Juvenile Proceedings. — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

Where the district court held a preliminary hearing, determined whether there was probable cause to believe the juveniles guilty, and transferred the case to the superior court, in substance, though not in form, the court complied with the requirements of this section. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

There exists no constitutional right to trial by jury in proceedings to terminate parental rights. In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981).

Notice and Opportunity to Be Heard, etc. —

In accord with 4th paragraph in original. See In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Notice and hearing are essential to due process of law. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

In order that there be a valid adjudication of a party's rights, he must be given notice of the action and an opportunity to assert his defense, and he must be a party to such proceeding. In re Wilson, 13 N.C. App. 151, 185 S.E.2d 323 (1971).

Both the law of the land and due process of law import notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Smith v. Keator, 285 N.C. 530, 206 S.E.2d 203, appeal dismissed, 419 U.S. 1043, 95 S. Ct. 613, 42 L.Ed.2d 636 (1974).

Notice is not a prerequisite to the determination of questions of a political nature, such as the necessity and expediency of a taking, but is only necessary prior to the determination of the issue of just compensation. City of Durham v. Manson, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

Eligibility for In-State Tuition is Not Basic Constitutional Right. — A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another or his basic constitutional right to vote. The regulations of the Board of Trustees of the University of North Carolina do not impede interstate travel. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L.Ed.2d 999 (1973).

And Less Stringent Equal Protection Standard Applies. — The regulations of the Board of Trustees of the University of North Carolina concerning eligibility for in-state tuition do not impede interstate travel. Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringent traditional equal-protection standards. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition, which the regulations have done. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L.Ed.2d 999 (1973).

Prohibiting Certain Activities on Sunday. —

The general rule is that the enactment of Sunday regulations is a legitimate exercise of the police power, and that the classification on which a Sunday law is based is within the discretion of the legislative branch of the government or within the discretion of the governing body of a municipality clothed with power to enact and enforce ordinances for the observance of Sunday, and will be upheld, provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

In determining whether a Sunday ban on the operation of billiard halls, but on no other businesses which provide facilities and opportunities for recreation, amusements and sports, denies equal protection to the operators of billiard halls, consideration must be given to the purpose of the ordinance and to the classification involved. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

Utilities Commission Intended to Set Rates as Low as Constitutionally Possible. — The origin of § 62-133 supports the inference that the legislature intended for the Utilities Commission to fix rates as low as may be reasonably consistent with the requirements of the due process clause of the Fourteenth Amendment to the Constitution of the United States, those of this section being the same in this respect. State ex rel. Utilities Comm'n v. Duke Power Co., 285 N.C. 377, 206 S.E.2d 269 (1974).

An order entered ex parte allowing a utility to effectuate a fuel adjustment clause did not, in view of the procedures available to contest such action, violate Art. I, § 19 of the State Constitution. State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

Applied in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); In re Hawkins, 17 N.C. App. 378, 194 S.E.2d 540 (1973); State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Putman, 28 N.C. App. 70, 220 S.E.2d 176 (1975); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976); Nantz v. Employment Security Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); Poole v. Hanover Brook, Inc., 34 N.C. App. 550, 239 S.E.2d 479 (1977); Duggins v. North Carolina State Bd. of Cert. Pub. Accountant Exmrs., 294 N.C. 120, 240 S.E.2d 406 (1978); State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); Wall & Ochs, Inc. v. Hicks, 469 F. Supp. 873 (E.D.N.C. 1979); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982); White v. Pate, 58 N.C. App. 402, 293 S.E.2d 601 (1982); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); Moore v. Swinson, 58 N.C. App. 714, 294 S.E.2d 381 (1982); State v. Deyton, 59 N.C. App. 326, 296 S.E.2d 497 (1982).

Quoted in State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); Pinehurst Airlines v. Resort Air Servs., Inc., 476 F. Supp. 543 (M.D.N.C. 1979).

Stated in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

Cited in McKinney v. Board of Comm'rs, 278 N.C. 295, 179 S.E.2d 313 (1971); Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972); In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975); Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Institutional Food House, Inc. v. Coble, 289 N.C. 123, 221 S.E.2d 297 (1976); In re Appeal of Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976); State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 30 N.C. App. 427, 227 S.E.2d 603 (1976), modified, 292 N.C. 1, 231 S.E.2d 867 (1977); State v. Terry, 30 N.C. App. 372, 226 S.E.2d 846 (1976); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977); State v. Giles, 34 N.C. App. 112, 237 S.E.2d 305 (1977); North Carolina Auto. Rate Administrative Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); Annas v. Davis, 40 N.C. App. 51, 252 S.E.2d 28 (1979); Garrison v. Miller, 40 N.C. App. 393, 252 S.E.2d 851 (1979); State v. Brown, 53 N.C. App. 82, 280 S.E.2d 31 (1981); Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981); Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982); Town of Atlantic Beach v. Young, 307 N.C. 422, 298 S.E.2d 686 (1983); State v. Davis, — N.C. App. —, 300 S.E.2d 861 (1983); Murphy v. Davis, — N.C. App. —, 300 S.E.2d 871 (1983).

II. RIGHTS OF DEFENDANTS IN CRIMINAL CASES.

Criminal Statute Must Be Definite. — A criminal statute or ordinance must be sufficiently definite to inform citizens of common intelligence of the particular acts which are forbidden. State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

Exclusion of Negroes from Grand Jury.— Where the defendant's evidence related to the racial composition of only one grand jury and one list of petit jurors, it did not show a course of conduct over a period of time resulting in an apparent systematic exclusion of the members of the Negro race from the grand juries or list of petit jurors and thus failed to establish a prima facie case of systematic exclusion of the members of the Negro race from either the grand jury which indicted the defendant or the petit jury which convicted him. State v. Newkirk, 14 N.C. App. 53, 187 S.E.2d 394, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972).

Burden upon Defendant to Establish Exclusion. — If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to estab-

lish it, but once he establishes a prima facie case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The burden is upon the defendant to establish racial discrimination in the composition of the jury. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L.Ed.2d 1205 (1976).

Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L.Ed.2d 1210 (1976).

Representation on juries in proportion to racial population, etc. —

A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

A defendant has no right to be tried by a jury containing members of his own race or even to have representative of his own race to serve on the jury. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L.Ed.2d 1205 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

But Indictment and Trial, etc. —

In accord with 1st paragraph in original. See State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the conviction cannot stand. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Defendant does have the right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Pearson, 32 N.C. App. 213, 231 S.E.2d 279 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

To establish a prima facie case of systematic racial exclusion, defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

Must Allege Systematic and Arbitrary Exclusion. — In the absence of a contention that blacks were systematically and arbitrarily excluded from the jury pool, unless there is systematic and arbitrary exclusion, then a defendant has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. State v. Pearson, 32 N.C. App. 213, 231 S.E.2d 279 (1977).

Denial Does Not Overcome Prima Facie Discrimination. — The mere denial by officials charged with the duty of listing and summoning jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is not sufficient to overcome a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Evidence Insufficient to Establish Prima Facie Discrimination. — Evidence that the black adult population of a county amounted to 20% of the total county population and that during the biennium beginning January 1970 approximately 10% of the petit jurors appearing for service in the court room were Negro, was held insufficient to make out a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Testimony by jury commissioners that, in some instances, they could determine from the address shown on the raw jury list card that the person named lived in a predominantly black or predominantly white neighborhood did not show an opportunity for discrimination sufficient to make out a prima facie case of racial discrimination. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Where defendant has failed to make out a prima facie case of arbitrary or systematic exclusion of Negroes from the jury, he has failed to show any violation of his constitutional rights as guaranteed by this section. State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

Defendant's mere showing that all Negroes were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitrary and systematic exclusion of Negroes. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

A jury list is not discriminatory, etc. —

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. Nor is a jury commission limited to the sources specifically designated by § 9-2. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Exclusion of Age Group from Jury List. — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Section Prohibits Double Jeopardy. — In accord with 2nd paragraph in original. See State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

It is a fundamental principle of the common law, now guaranteed by the federal and state constitutions, that no person can be twice put in jeopardy of life or limb for the same offense. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971); State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

The sacred principle of the common law that no person can twice be put in jeopardy of life or limb for the same offense has always been an integral part of the law of North Carolina, therefore, the decision in Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969), which made the double jeopardy provision of the Fifth Amendment applicable to the several states through the Fourteenth Amendment, added nothing to the law of this State. State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971).

The common-law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and the State Constitutions. State v. Allen, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972).

Prohibition against double jeopardy has long been regarded as a part of the "law of the land" in North Carolina. State v. Urban, 31 N.C. App. 531, 230 S.E.2d 210 (1976).

The law of the land clause of the North Carolina Constitution, this section, has also been held to embrace the double jeopardy clause of the Fifth Amendment to the United States Constitution. State v. Cooley, 47 N.C. App. 376, 268 S.E.2d 87, appeal dismissed and cert. denied, 301 N.C. 96, 273 S.E.2d 442 (1980).

The constitutional prohibition against double jeopardy applies only to criminal cases. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Double Trials and Punishment Prohibited. — The constitutional principle of double jeopardy is designed to protect an accused from double punishment as well as double trials for the same offense. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

When Defendant Is Placed in Double Jeopardy. — A defendant is placed in double jeopardy when he is tried twice or punished twice for the same crime. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

The general rule is that the defense of double jeopardy is not jurisdictional. State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977); State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Double jeopardy is a personal defense. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

The defense of double jeopardy is personal to the defendant. State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

The burden is upon defendant to sustain his plea of double jeopardy. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

Generally the defense of double jeopardy is raised by a special plea upon which the defendant carries the burden. State v. McKenzie, 292 N.C. 170, 232 S.E.2d 424 (1977).

Abandonment of Plea of Double Jeopardy. — Where the defendant fails to plead double jeopardy and to offer supporting evidence thereon, he is therefore deemed to have abandoned the plea of double jeopardy. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

Test of Double Jeopardy. — The double jeopardy tests are whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment, or whether the same evidence would support a conviction in each case. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

The applicable double jeopardy test in an assault case is the "same evidence test" which asks two questions. First, whether the facts alleged in the second indictment if given in evidence would have sustained a conviction under the first indictment. (The answer to this question is determined by an examination of the two indictments.) The second question posed by the "same evidence test" asks "whether the same evidence would support a conviction in each

case" and looks at facts dehors the indictments. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

It is obvious that both petitions for adjudication of delinquency arose from the same incident. This does not, however, automatically require a finding that jeopardy has twice attached. The test of former jeopardy is not whether respondent has been tried for the same act, but whether he has been put in jeopardy for the same offense. The offenses must be the same both in fact and in law. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Double jeopardy does not occur when the evidence to support two or more offenses overlaps, but only when the evidence presented on more than one charge is identical. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

There are essentially three contexts in which the North Carolina Supreme Court has held that conviction and punishment of a defendant for more than one offense results in impermissible multiple punishment: (1) where a defendant is convicted and sentenced for both felony murder and the underlying felony; (2) where a defendant is convicted and sentenced for two offenses, one being a lesser included offense of the other; and (3) where a defendant is convicted and sentenced for two offenses each arising out of the same conduct but to which the legislature has affixed two criminal labels and prosecutorial abuse is evident. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes in this case. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

"Additional Facts" Test Explained. — The additional facts test of double jeopardy is as follows: a single act may be an offense against two statutes, and if each statute requires proof of an additional fact, which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

If a single act constitutes an offense against two statutes and each statute requires proof of an additional fact which the other does not, the offenses are not the same in law and in fact and a defendant may be convicted and punished for both. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Application of Additional Facts Test. — The additional facts test is bilateral in its application. The two offenses may have one or more circumstances in common, but in order to constitute sufficiently for prosecution either of the offenses, some additional circumstance must be added. It is the added circumstance to each which makes each a separate and distinct offense. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

"Lesser Degree" Rule. — In determining whether jeopardy had attached, it is necessary to apply tests firmly established by the courts. First the "lesser degree" rule. Where the second indictment is for a crime greater in degree than the first, and where both indictments arise out of the same act, an acquittal or conviction for the first is a bar to a prosecution for the second. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

By the term, "same offense," is not only meant the same offense as an entity and designated as such by legal name, but also any integral part of such offense which may subject an offender to indictment and punishment. When such integral part of the principal offense is not a distinct affair, but grows out of the same transaction, then an acquittal or conviction of an offender for the lesser offense will bar a prosecution for the greater. State v. Cannon, 38 N.C. App. 322, 248 S.E.2d 65 (1978).

A person's right to be free from double jeopardy is violated not only when one is tried for and convicted of offenses which are in law and fact identical, but also when one is charged and convicted of two offenses, one of which is a lesser included offense of the other, where both offenses arose out of the same series of events. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

One offense is a lesser included offense of a more serious offense if all the essential elements of the lesser offense are also essential elements of the greater offense; and therefore proof sufficient to support a conviction on the more serious offense would also support conviction on the lesser offense. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

A plea of former jeopardy, etc. —

To support the plea of double jeopardy, it is of no consequence that the earlier prosecution grew out of the same transaction. It must have been the same offense both in fact and in law. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

When Jeopardy Attaches. — Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Allen, 16 N.C. App. 159, 191 S.E.2d 403, appeal dismissed, 282 N.C. 305, 192 S.E.2d 193 (1972); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976); State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

It is clearly established in this State that jeopardy cannot attach until a jury has been sworn and empaneled. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Fact that concurrent, identical sentences are imposed in each case makes duplication of conviction and punishment no less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

No Limit to Number of Mistrials. — There is no specific limit to the number of times a defendant may be retried after a mistrial has been properly declared. State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981).

Order of mistrial generally will not support a plea of former jeopardy. State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982).

Double Jeopardy Provision Not Violated by Mistrial Order and Another Trial. — Both federal decisions, applying the Fifth Amendment, and State decisions, applying common law and State constitutional principles, have recognized that, in certain situations arising in criminal prosecutions, the court may order a mistrial before verdict and again place defendant on trial without violating the double jeopardy prohibition. State v. Preston, 9 N.C. App. 71, 175 S.E.2d 705 (1971).

An order of mistrial in a criminal case when the jurors declare their inability to agree must be left to the trial judge, in the exercise of his judicial discretion, and will not support a plea of former jeopardy. State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971).

Where it was unchallenged that an expression of opinion by a law-enforcement officer as to the weakness of the State's case had reached the jury box, the juror's statement that he would not be prejudiced by this remark would not, standing alone, prevent the trial judge from exercising his discretion and declaring a mistrial and the defendant's subsequent plea of former jeopardy was properly denied. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

Where Mistrial Was Ordered for Physical Necessity or Necessity of Doing Justice. — Even where all the elements of jeopardy appear, a plea of former jeopardy will not prevail where the order of mistrial was properly entered for "physical necessity or for necessity of doing justice." State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

A subsequent trial of a defendant, following the termination of earlier proceedings upon an order of mistrial, is not precluded by a plea of former jeopardy where the mistrial was granted, over defendant's objections, due to "a physical necessity or the necessity of doing justice." State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

"Physical necessity" is illustrated where a juror by a sudden attack of illness is wholly disqualified from proceeding with the trial, or where the prisoner becomes insane during the trial, or where a female defendant is taken in labor during the trial. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" is not an expression connoting a vague generality but one that relates to a limited subject, namely, the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

"Necessity of doing justice" arises from the duty of the court to guard the administration of justice from fraudulent practices; as in the case of tampering with the jury, or keeping back the witnesses on the part of the prosecution. State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

The test of "necessity of doing justice" does not exist solely for the benefit of a defendant. It is fundamental in our system of jurisprudence that each party to an action is entitled to a fair and impartial trial. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

Duty of Judge Ordering Mistrial in Capital Cases. — In all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge, but in capital cases he is required to find the facts fully and place them upon record so that upon a plea of former jeopardy, the action of the court may be reviewed.

State v. Cutshall, 278 N.C. 334, 180 S.E.2d 745 (1971).

In capital cases the trial court must make findings of fact upon granting a mistrial and place them in the record so that the court's action may be reviewed on appeal. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

The decision to grant a mistrial is a decision well within the trial judge's discretion when faced with the occurrence of some incident of a nature that would render impossible a fair and impartial trial under the law. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977).

Temporary Interruption of Trial. — Defendant was not subjected to double jeopardy and he was subjected to only one trial where there was a temporary interruption of the trial based upon the unexpected inability of a scheduled witness to be present due to his physical condition. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Final verdict is required before there can be an implied acquittal. Jury votes on included offenses may be the result of a temporary compromise in an effort to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict. State v. Booker, 306 N.C. 302, 293 S.E.2d 78 (1982).

Applicability in Juvenile Proceedings. — Juvenile proceedings in North Carolina do more than merely determine the delinquency of the minor; they may result in severe curtailment of his freedom and, in some cases, in institutional commitment. Although distinctions between juvenile proceedings and criminal prosecutions do still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Plea of Double Jeopardy May Be Waived. — The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by a defendant. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

And Waiver May Be Implied. — A waiver of the constitutional right not to be placed in jeopardy twice for the same offense is usually implied from the action or inaction of a defendant when brought to trial in the subsequent proceeding. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

A plea of guilty constitutes a waiver of the plea of former jeopardy. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

If double jeopardy is raised as a defense it is abandoned by a subsequent plea of guilty. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

When defendant entered a plea of guilty to a charge after his previously entered plea of former jeopardy was overruled he thereby waived his right, if any, to dismissal of the charge on the ground of former jeopardy. State v. Hopkins, 279 N.C. 473, 183 S.E.2d 657 (1971).

As Does Appeal. — When a defendant seeks a new trial by appealing his conviction he waives his protection against reprosecution. State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977).

But if a criminal conviction is reversed on appeal for insufficiency of the evidence, double jeopardy precludes remanding the case for a new trial even if the State has evidence which it could offer at a new trial but did not offer at the trial from which the appeal was taken; however, there is no such impediment in ordering a new trial when the first trial was tainted by mere "trial error." State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

If a life sentence is imposed following conviction for a capital crime, double jeopardy considerations prohibit an appeal by the State or the ordering of a new sentencing hearing on defendant's appeal of his conviction even if the life sentence was the result of trial error favorable to defendant. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

New Sentencing Hearing after Defendant's Appeal of Death Sentence. — If upon defendant's appeal of a death sentence the case is remanded for a new sentencing hearing, double jeopardy prohibitions would not preclude the State from relying on any aggravating circumstance of which it offered sufficient evidence at the hearing appealed and which was either not then submitted to the jury or, if submitted, the jury then found it to exist. State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981).

Two Offenses Arising Out of Same Transaction. — Since possession and sale of heroin are separate offenses, defendant was not subjected to double jeopardy where he was tried for both offenses arising out of the same transaction, found guilty of such and given consecutive sentences. State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973).

Possession and distribution of heroin are separate and distinct offenses, and a defendant may be prosecuted for both without violating the constitutional prohibition against double jeopardy. State v. Patterson, 21 N.C. App. 443, 204 S.E.2d 709 (1974).

The crimes of possession and sale are separate and distinct offenses and a conviction on

both such offenses does not constitute double jeopardy. State v. Gleason, 24 N.C. App. 732, 212 S.E.2d 213 (1975).

Since illegal possession of a controlled substance is not a lesser included offense of illegal sale, there is no violation of the constitutional proscription against double jeopardy in the punishment of defendant for both crimes growing out of a single transaction. State v. Aikens, 22 N.C. App. 310, 206 S.E.2d 348, aff'd, 286 N.C. 202, 209 S.E.2d 763 (1974).

Possession of methamphetamine and sale of methamphetamine are two separate and distinct offenses, and a defendant can be convicted of both crimes and not have his constitutional rights violated. State v. Salem, 50 N.C. App. 419, 274 S.E.2d 501, cert. denied, 302 N.C. 401, 279 S.E.2d 355 (1981).

Defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Plea of Former Jeopardy Upheld. — Where judgment of nonsuit on the ground of variance was entered in a defendant's trial upon an indictment charging armed robbery of a store in which the life of a named employee was endangered and in which money belonging to the store was taken from the named employee and where defendant was subsequently prosecuted upon another armed robbery indictment for the same occurrence which alleged that the lives of two other employees were endangered and that the money was taken from the two other employees, and where the evidence in both trials showed that the robbery was perpetrated by endangering and threatening all employees then present in the store, including those named in both indictments, but that the money was removed from the immediate presence of the two employees named in the second indictment, the Supreme Court held that the same evidence would support a conviction in both trials, and therefore defendant's plea of former jeopardy prior to his second trial should have been allowed. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The affray charge upon which respondent juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge barred further petitions based on that charge. Therefore, respondent was twice put in jeopardy for the same offense under § 14-33 and the trial judge erred in failing to dismiss the petition. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Revocation of Driver's License Cannot Constitute Double Jeopardy. — Since the revocation of a driver's license is not a form of criminal punishment, it cannot constitute double jeopardy. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Prosecution, Conviction and Punishment Distinguished In Double Jeopardy Analysis. — Prosecution of defendants under § 14-34.2 for assault on a law enforcement officer with a firearm and under § 14-32 for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Where defendants were charged with assault on a law enforcement officer with a firearm and assault with a deadly weapon with intent to kill, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law enforcement officer with a firearm, and this result would punish defendants twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed and cert. denied, 301 N.C. 404, 273 S.E.2d 449 (1980).

Double jeopardy did not result when defendant was tried and convicted of kidnapping for the purpose of facilitating flight following his participation in an armed robbery and of armed robbery, since the intent of the legislature in establishing the punishment for kidnapping was to impose an indivisible penalty for restraint and removal for specified purposes, no hypothetical part of which penalty represents a punishment for the felony which gave rise to the flight of defendant and his removal of the victim, and the crimes of armed robbery and kidnapping involve vastly different social implications, and the legislature is clearly free to denounce each as a separately punishable offense. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35, appeal dismissed and cert. denied, 301 N.C. 238, 283 S.E.2d 134 (1980).

Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury and assault with intent to commit rape did not subject him to double jeopardy, since the elements for the two crimes are not the same. State v. Herring, 50 N.C. App. 298, 273 S.E.2d 29 (1981).

That evidence is obtained by police officers outside of their territorial jurisdiction while conducting undercover investigation was not fundamentally unfair to defendant.

State v. Afflerback, 46 N.C. App. 344, 264 S.E.2d 784 (1980).

Indictment, Arraignment and Trial On Same Day. — Defendant's indictment, arraignment, and trial on the same day on a burglary charge was not such a flagrant violation of his due process rights that the court was required to dismiss the burglary indictment, since defendant, by not contesting indictments for armed robbery, larceny, and rape conceded that he had been given sufficient time in which to prepare a defense on these charges; the burglary indictment arose out of the same series of events which led to the three other indictments; the offenses took place at such a close proximity in time that any defense which counsel might have prepared to the charge of burglary could not have significantly differed from the defenses he did prepare to the charges of larceny, armed robbery, and rape; and any proof of the nonexistence of the essential elements of burglary would necessarily be included in defendant's defense on the other charges in this case, because for each charge defendant would seek to disprove the State's evidence of the sequence of events leading up to the charge, which facts also supported the burglary indictment. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

A defendant has no vested right to a particular juror. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Right to Reject Prejudicial Juror. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Sustaining State's Challenges of Jurors. — Where it was perfectly clear from their answers that each of the prospective jurors, before hearing any of the evidence, had already made up his mind that he would not return a verdict pursuant to which the defendant might lawfully be executed whatever the evidence might be, the State's challenges for cause were properly sustained. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Jury's Consideration of Date Charged in Indictment. — In a prosecution for rape upon an indictment which alleged that the crime occurred on March 24, 1978, defendant was not denied a fair trial because of the court's failure to limit the jury's consideration to the specific date charged in the indictment where a contextual reading of the record made it clear that the jury's consideration of the crime was restricted to defendant's actions on or about March 24, 1978, the record revealed nothing indicating that defendant was surprised or hampered by any attempt of the State to alter the date charged in the bill of indictment, and defendant squarely met the State's evidence concerning his actions on or about March 24, 1978. State v. Summitt, 301 N.C. 591, 273 S.E.2d 425, cert. denied, 451 U.S. 970, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

Section Preserves Right of Confrontation and Cross-Examination. — "The law of the land" guaranteed by this section of the Constitution, synonymous with "due process," preserves the right of confrontation and cross-examination to an accused in a criminal action. By cross-examination a witness may be questioned as to prior inconsistent statements or as to any act inconsistent with his testimony in order to impeach him or cast doubt upon his credibility. State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970).

The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 23. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

The right to face one's accusers and witnesses with other testimony is guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, this section, and by Art. I, § 23, of the Constitution of North Carolina. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

The rights to assistance of counsel and of confrontation of one's accusers and witnesses are guaranteed by the Sixth Amendment to the federal Constitution and by Art. I, §§ 19 and 23 of the North Carolina Constitution. State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

The test under the due process clause as to pretrial identification procedures is whether the totality of the circumstances reveals that the pretrial procedures were so unnecessarily suggestive and conducive to an irreparable mistaken identification as to offend fundamental standards of decency, fairness and justice. State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768, cert. denied, 291 N.C. 449, 230 S.E.2d 766 (1976); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

Factors to be considered in evaluating the likelihood of mistaken identification for due process pretrial identification purposes include (1) the opportunity of the witness to observe the defendant at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' description of the defendant, (4) the level of certainty demonstrated by the witness, and (5) the length of time between the crime and the confrontation. State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

Showups. — Although the practice of showing suspects singly for identification purposes has been recognized as suggestive and widely condemned, whether such a confrontation violates due process depends upon the totality of the circumstances. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Requirements for In-Custody Confrontation for Identification Purposes. — An in-custody confrontation for identification purposes requires that: (1) the accused be warned of his constitutional right to the presence of counsel during the confrontation; (2) when counsel is not knowingly waived and is not present, the testimony of witnesses that they identified the accused at the confrontation must be excluded, and (3) the in-court identification of the accused by a witness who participated in the pretrial out-of-court confrontation must likewise be excluded unless it is first determined on voir dire that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure; failure to observe these requirements is a denial of due process. State v. Tann, 302 N.C. 89, 273 S.E.2d 720 (1981).

In-Court Identification Held Competent. — When the trial court found and concluded that the in-court identification of defendant by the witnesses was not tainted by any outside confrontation but was based upon the identification during the course of the alleged robbery, and this finding is supported by competent evidence, it alone renders the in-court identification competent even if it be conceded arguendo that the showup procedure was improper. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

There was no violation of this provision in requiring the defendant to stand before the jury and place the orange stocking mask over his head and face in the way the victim had testified it was worn by the man who robbed and shot her. State v. Perry, 291 N.C. 284, 230 S.E.2d 141 (1976).

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

Finding of Competency Conclusive When Supported by Competent Evidence. — A finding that an in-court identification of defendant was not tainted or rendered incompetent as evidence by the subsequent unconstitutional showup, when supported by competent evidence, is conclusive on appellate courts, both State and federal. State v. Odom, 18 N.C. App. 478, 197 S.E.2d 35 (1973).

The fact that under § 15A-941 the solicitor reads the charges or fairly summarizes them to the defendant before the jury is not a violation of defendant's right to due process and equal protection as required by the Constitutions of the State of North Carolina and the United States. State v. Carter, 30 N.C. App. 59, 226 S.E.2d 179, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Defendant Exhibited to Jury. — Defendant was not denied due process of law when he was compelled to exhibit himself to jury for purpose of allowing police officer to identify certain physical characteristics on defendant's person, since such procedure did not offend the sense of justice implicit in the due process clause of the Fourteenth Amendment of the United States Constitution and this section, but such procedure was simply a logical extension of the rule that witnesses may testify as to a defendant's physical condition or as to identifying marks on his body. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, appeal dismissed and cert. denied, 301 N.C. 102, 273 S.E.2d 306 (1980), 450 U.S. 915, 101 S. Ct. 1356, 67 L. Ed. 2d 339 (1981).

A defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

In the absence of a showing of necessity therefor, compelling the defendant to stand trial while shackled is inherently prejudicial in that it so infringes upon the presumption of innocence that it interferes with a fair and just decision of the question of guilt or innocence. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Burden of Showing Necessity on State. — Because of the inherent prejudice engendered by the use of shackles, the rule since the earliest cases has been that the burden of

showing necessity for such measures rests upon the State. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

The rule against shackling is subject to the exception that the trial judge, in the exercise of his sound discretion, may require the accused to be shackled when such action is necessary to prevent escape, to protect others in the courtroom or to maintain order during trial. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Judicial Discretion. — The power to order a defendant to stand trial while handcuffed or shackled calls for a meaningful exercise of judicial discretion. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Reasons on Record. — When the trial judge, in jury cases, contemplates the necessity of employing unusual visible security measures such as shackles, he should state for the record, out of the presence of the jury, the particular reasons therefor and give counsel an opportunity to voice objections and persuade the court that such measures are unnecessary. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Jury Instruction. — In any case where the trial judge, in the exercise of sound discretion, determines that the defendant must be handcuffed or shackled, it is of the essence that he instruct the jury in the clearest and most emphatic terms that it gives such restraint no consideration whatever in assessing the proofs and determining guilt. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Objection Required for Appeal. — Defendant, while ordinarily constitutionally entitled to appear at his own trial free of shackles, must, when shackling is suggested, object to the proposed restraint and, absent reasonable excuse therefor, failure to do so will ordinarily preclude the shackling as an issue on appeal. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Test on Appeal. — The propriety of physical restraints on an accused depends upon the particular facts of each case, and the test on appeal is whether, under all the circumstances, the trial court abused its discretion. State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

The trial court did not err in ordering that defendant be restrained in the courtroom by the use of shackles, and there was no merit to defendant's argument that the shackling was improper absent a showing that he had previously tried to escape or evidence of a planned escape, since the evidence tended to show that defendant was charged with crimes of violence; he was 29 years old and apparently in good health; other serious charges were pending against him, including an appeal from a conviction the previous week for which he received a 40 to 50 year prison sentence; only one deputy was available to serve as bailiff and provide security in the courtroom; and there was a warrant outstanding charging him with escape from another jurisdiction. State v. Billups, 301 N.C. 607, 272 S.E.2d 842 (1981).

Constitutional right to counsel has long been recognized as an entitlement to the effective assistance of counsel. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Test of effective assistance of counsel is whether the assistance given was within the range of competence demanded of attorneys in criminal cases. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

A defendant in a criminal proceeding whether at trial or in pretrial proceedings may waive his right to counsel if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Indigent Defendant Can Waive Counsel. — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Indigency is obviously a sufficient basis for classification with reference to the right to court-appointed, publicly paid counsel, but it is not a reasonable basis for classification as to the right to represent one's self. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. State v. Hall, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Denial of post-indictment motions for probable cause hearing. — In a prosecution for first-degree murder and armed robbery, the denial of defendants' post-indictment motions for a probable cause hearing did not violate § 15A-606(a) or deprive defendants of equal protection and due process of law. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Right to Counsel Includes Reasonable Time for Preparation. — The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable

time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

But Where Defendant's Actions Prevented Adequate Preparation, He Is Solely Responsible. — The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he were indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

Free Transcript for Indigents. — There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

State Not Required to Furnish Transcript of Separate and Distinct Proceeding Against Different Defendants. — Where defendant sought a transcript of a separate and distinct proceeding with a different jury and different defendants, there was no support for defendant's contentions that denial of the transcript was a violation of due process and equal protection rights, because in the absence of compelling evidence of the need for a transcript of a separate proceeding to afford defendant adequate tools for his defense, and no alternative means of obtaining such information, the State should not be required to furnish such a transcript. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

State's de novo procedure has no requirement that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The purpose of State's de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the district court and to offer them an opportunity to learn about the State's case without revealing their own. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Discretion to Prosecute for Capital Offense or Not. — Defendant's argument that he was denied due process because the district attorney had the absolute discretion to charge and prosecute for a capital offense or to bring an accused to trial upon a lesser included offense has been considered and rejected in a number of cases. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

If a defendant's motion for a continuance in a criminal prosecution is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying the defendant's motion for a continuance under circumstances in which the 17 days the defendant's counsel had to prepare for trial was not a reasonable time to comply with the defendant's constitutional right to assistance of counsel in his defense. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

Statements that Defense Counsel Was from Another Part of State. — Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

The privilege against disclosure of an informant's identity, etc. —

In accord with 1st paragraph in original. See State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973).

Inculpatory Statements. — Cases dealing with a defendant's inculpatory statements project two predominant concerns: (1) that the circumstances surrounding defendant's interrogation do not render his statement inherently unreliable because involuntary; and (2) that

overzealous officers be deterred from the use of unconstitutional and illegal practices in obtaining a statement from the accused. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

In-Custody Statements. —

The prosecutor's impeachment of defendant by cross-examining him about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's rights under the Fifth or Fourteenth Amendments to the United States Constitution or this section or N.C. Const., Art. I, § 23. State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, appeal dismissed and cert. denied, 301 N.C. 403, 273 S.E.2d 449 (1980).

Admissibility of Death Certificate. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Denial of Defendant's Right to Examine Written Pretrial Statements of State's Witnesses. — Where the trial judge denied defense counsel's motion to examine any of the state's witnesses' pretrial statements that had been reduced to writing, the denial violated defendant's due process rights. State v. Voncannon, 49 N.C. App. 637, 272 S.E.2d 153 (1980), rev'd on other grounds, 302 N.C. 619, 276 S.E.2d 370 (1981).

Whether destruction of physical evidence by the State infringes upon accused's rights depends upon circumstances in each case. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Destruction of Evidence Where Samples, Reports, etc., Preserved. — In prosecution under § 90-95, destruction of marijuana by State for lack of storage facilities, where State made random samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under N.C. Const., Art. I, § 23, nor infringe defendants' due process rights under the federal and state constitutions. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Right of Cross-Examination. —

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Scope of Cross-Examination. — In cross-examination the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been arrested for, indicted for or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Acquittal on Basis of Insanity. — A verdict of not guilty due to insanity constitutes a full acquittal, and one thus acquitted is entitled to all the protection and constitutional rights as if acquitted upon any other ground. In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972).

Restoration to Sanity Procedure Is Unconstitutional. — Since the absolute certification requirement of former § 122-86 would not permit a petitioner to establish his restoration to sanity by the testimony of qualified psychiatrists, and provided no remedy or procedure whatever to determine a charge that a superintendent arbitrarily withheld a certificate, acted in bad faith, or was honestly mistaken in judgment, but rather merely decreed that no judge should discharge a person acquitted of crime because of insanity until the superintendents of the several State hospitals had certified to his sanity and safety, it did not meet the requirements of due process and was therefore unconstitutional. In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972).

When the punishment does not exceed the limits fixed by statute, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

Punishment When Person Is Without Knowledge of Facts Making Act Criminal. — It is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is

without knowledge of the facts making the act criminal, and this is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Imposition of Punishment, etc. —

Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972).

Imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first-degree rape did not violate defendant's equal protection rights because other persons involved in the same offenses received lesser punishments. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Reasonable Time for Defense. — It is implicit in these constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

No set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Assistance of Counsel Means Effective Assistance. — The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

And May Be Considered on Direct Appeal. — The question of alleged failure of counsel to render effective representation can be considered on direct appeal. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

There are no set rules to determine whether a defendant has been deprived effective assistance of counsel; rather each case must be approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Trial Judge Better Able to Evaluate Effectiveness. — The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Assistance Effective. — Notwithstanding the defense attorney's hearing disability, his efforts and the assistance of co-counsel provided defendant with effective legal representation throughout the criminal proceedings. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Right to Effective Assistance of Counsel Not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudices defendant's case and denies him his right to effective counsel, there is no error in the denial of the motion to continue. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Mere Failure to Grant Continuance Not Denial of Effective Assistance. — Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself, constitute a denial of effective assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Trial counsel's failure to move for exclusion of three State's witnesses from courtroom until each one was called to testify is not evidence of ineffective assistance of counsel. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Nor Was Counsel's Inaction Concerning In-Court Identifications. — Where the record does not indicate any impermissibly suggestive pretrial identification procedures that would taint the witnesses' in-court identifications, defendant's counsel's failure to object or move

for a voir dire examination is not indicative of ineffective representation. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Nor Failure To Move For Dismissal For Insufficient Evidence. — Defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant and did not constitute ineffective representation because the sufficiency of the evidence is reviewable on appeal without regard to whether a motion was made at trial. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Use of Defendant's Refusal to Submit to Test until Attorney Present. — The administration of a gunshot residue test is not a critical stage of criminal proceedings to which the constitutional right to counsel attaches. Therefore, testimony that defendant refused to submit to the test until she talked to her attorney does not violate her constitutional rights. State v. Odom, 303 N.C. 162, 277 S.E.2d 352 (1981).

Enjoining Enforcement of Ordinance by Criminal Prosecution. — Nothing else appearing, the enforcement of an ordinance, by the criminal prosecution of those who violate it, will not be enjoined in a suit brought by an acknowledged violator, whose contention is that the ordinance is invalid or that it is administered or enforced in a discriminatory manner in violation of the equal protection of the laws. His right to present this defense at his trial on the criminal charge, or to maintain a civil action for damages, is deemed to constitute an adequate remedy at law. Where, however, a plaintiff's legitimate business is threatened with destruction, through an announced purpose of making repeated arrests of his employees or customers and charging them with the violation of an allegedly invalid law, a suit for injunctive relief is an appropriate procedure for testing the equal protection constitutionality of the law, or of the contemplated enforcement program. S.S. Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Showing by Defendant Deprived of Right to Appeal. — When a defendant has been deprived of his right to a complete and effective appeal, he need not demonstrate that he was prejudiced or that he has arguable grounds for a successful appeal; thus, in determining whether the defendant's constitutional rights have been violated, the court should not examine the merits of the issues to be raised in a belated appeal. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Remedy for Unconstitutionally Denying Appeal. — When a petitioner has been unconstitutionally denied his appeal, the deficit may be fully rectified should the State grant a belated appeal, and nothing more is necessary to correct the constitutional violation; however, should the State be unable to secure petitioner a belated appeal, it could, nevertheless, also correct the violation by vacating the conviction and granting petitioner another trial and appeal. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

III. TAKING OF PRIVATE PROPERTY FOR PUBLIC USE.

Property May Be Taken Only for Public Use. —

Private property can be taken by the exercise of the power of eminent domain only where the taking is for a public use. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Due process of law requires that private property be taken under the power of eminent domain only for a public use. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

There is a fundamental right to just compensation, grounded in natural law and justice, that it is part of the fundamental law of this state, and which imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in this section. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Just Compensation Part of "Law of the Land". — North Carolina recognizes the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of the law of the land within the meaning of this section. The requirement that just compensation be paid for land taken for a public use is likewise guaranteed by the Fourteenth Amendment to the federal Constitution. Department of Transp. v. Harkey, — N.C. —, 301 S.E.2d 64 (1983).

Recovery Allowed Despite Lack of Express Constitutional Provision Therefor. — While this State does not have an express constitutional provision against the "taking" or "damaging" of private property for public use

without payment of just compensation, recovery is allowed for a taking on constitutional as well as common law principles. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Prohibition of Use of Property. — It is quite true that the police power of the State, which it may delegate to its municipal corporation, extends to the prohibition of a use of private property which may reasonably be deemed to threaten the public health, safety, or morals or the general welfare and that, when necessary to safeguard such public interest, it may be exercised, without payment of compensation to the owner, even though the property is thereby rendered substantially worthless. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982); Harrell v. City of Winston-Salem, 22 N.C. App. 386, 206 S.E.2d 802, cert. denied, 285 N.C. 757, 209 S.E.2d 281 (1974).

Police Regulation Can Only Be Justified by Presence of Public Interest. — Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary and unreasonable upon the use of private property. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Regulation of Property Based on Aesthetic Considerations Permitted. — Reasonable regulation of property based on aesthetic considerations may constitute a valid basis for the exercise of the police power depending on the facts and circumstances of each case. Previous cases are overruled to the extent that they prohibited regulation based upon aesthetic considerations alone. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

But Power Not Delegable to Subordinate Groups. — Local legislative bodies charged with the responsibility for and the exercise of the police power in the promulgation of property regulations based solely upon aesthetic considerations should not delegate such responsibility to subordinate groups or organizations which are not authorized by the General Assembly to exercise the police power. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Test for Regulation of Property Based on Aesthetic Considerations. — The diminution in value of an individual's property should be balanced against the corresponding gain to the public from such regulation. Some of the factors which should be considered and weighed in applying such a balancing test include such private concerns such as whether the regulation results in confiscation of the most substantial part of the value of the property or deprives the property owner of the property's reasonable use, and such public concerns as the purpose of the regulation and the manner in achieving a permitted purpose. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Aesthetic regulations may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents. Such corollary community benefits would be factors to be considered in balancing the public interests in regulation against the individual property owner's interest in the use of his property free from regulation. The test focuses on the reasonableness of the regulation by determining whether the aesthetic purpose to which the regulation is reasonably related outweighs the burdens imposed on the private property owner by the regulation. State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Public necessity is the limit of the right to destroy property which is a menace to public safety or health and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Governmental Immunity Not a Defense to Liability for Compensation. — If a "taking" has occurred, it is compensable though it results from a function which is governmental in nature. Governmental immunity is not a defense where there is a "taking" of private property for public use whether that use be proprietary or governmental in nature. The test of liability is whether, notwithstanding its acts are governmental in nature and for a lawful public purpose, the municipality's acts amount to a partial taking of private property. If so, just compensation must be paid. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Land to Increase Highway Visibility May Not Be Taken under Guise of Police Power. — If, in the interest of public safety at an intersection of highways, greater visibility is required than is afforded by removing obstructions from existing rights-of-way, land necessary to afford such increased view of approaches to the intersection may be taken by the appropriate public authorities under the power of

eminent domain, with just compensation for the land so taken paid to the property owner; but the property may not be taken for such purpose, without compensation, under the guise of a regulation of the owner's business pursuant to the police power. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

Restriction on Location of Fence Is a Taking. — An ordinance that a fence must be built substantially within the boundaries of a lot in which an automobile wrecking business is located is a taking of the lot owner's property for a public use without compensation. State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972).

Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or this section or violate any other constitutional limitation upon legislative power. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

Statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law or violate any other constitutional limitation upon legislative power. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976); Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Substitute condemnation is a transaction in which the State or an agency with the power of eminent domain, A, takes land under an agreement to compensate its owner, B, with land to be taken in condemnation proceedings from a third person, C, instead of with money. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

There is no denial of due process or other constitutional infirmity in substitute condemnations where the owner of the land first taken with whom the ultimate condemnee's land is to be exchanged, also has the power of condemnation and could itself have condemned the land. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Public Use and Necessity in Substitute Condemnation. — In controversies concerning substitute condemnation the questions of public use and necessity are inseparable. Whether land has been taken for a public use in a substitute condemnation will depend on whether fairness requires that B whose land has been taken for an undisputed public purpose, be compensated in land and whether there is a close factual connection between the taking of B's and C's land, taken to compensate B. Whether it is necessary to exercise the power of eminent domain will turn on whether B can be fairly compensated only in land. Whether it is necessary to take C's property depends on whether there is a close factual connection between the two takings. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation of land for exchange can only be justified when the property for which it is substituted accomplishes the public purpose for which it was taken, and the cost is not disproportionate to the benefit derived. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Substitute condemnation is a valid exercise of a power of eminent domain only when the substitution of other property is the sole method by which the owner of land taken for public use can be justly compensated, and the practical problems resulting from the taking can be solved. North Carolina State Highway Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972).

Pleading Requirement in Inverse Condemnation Proceedings. — In an inverse condemnation suit where plaintiff's advertisement sign was torn down by defendant city, plaintiff's allegation that the sign was removed in the furtherance of the city's purposes, in that the sign was located on or interfered with the possession, control and use of defendant's easements, was sufficient to support the pleading requirement of alleging a taking for a public use or purpose. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980).

Damages from airplane overflights discussed. See Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Ordering Demolition of House for Nonconformity with City Housing Code. — An action by a municipality, pursuant to an ordinance adopted under the authority of former § 160-182, in ordering the demolition of a dwelling house without compensation to the owner thereof, and in charging the expense of demolition to the owner upon his failure to demolish the house himself, such action being based upon findings by the city building inspector that the house was unfit for human habitation and that the repairs necessary to bring the house into conformity with the housing code would cost 60% or more of the present value of the house, is violative of the law of the land clause of the State Constitution, where (1) the house could be repaired so as to comply with the housing code and (2) the owner was not afforded a reasonable opportunity to repair the house. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

Where it appears from the findings of a city housing commission that a house can be repaired so as to comply with the city's housing

code, be suitable for human habitation and be no longer a threat to public health, safety, morals or general welfare, to require its destruction without giving the owner a reasonable opportunity thus to remove the existing threat to the public health, safety and welfare is arbitrary and unreasonable. Such power may not be delegated to or exercised by a municipal corporation of this State by reason of this section. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

A homeowner who is faced with a municipal housing inspector's order giving him no alternative but to demolish his home that was declared uninhabitable by the municipality, or to pay the expense of a demolition by the municipality, is not required to propose an alternative remedy for the condition of the house before asserting his constitutional right in the courts. Horton v. Gulledge, 277 N.C. 353, 177 S.E.2d 885 (1970), overruled on other grounds, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

City May Compensate for Easements by Agreement to Furnish Fire Protection Outside City Limits. — A municipality has the authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by an agreement to furnish fire protection for any buildings located on such tract. Valevias v. City of New Bern, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

Zoning ordinance which required that owner of building material salvage yard remove his property within three years did not amount to a taking of his property for a public purpose without just compensation where he was notified on several occasions after the expiration of three-year period that he was in violation of the law, but he made no effort to comply with the ordinance because he "did not think it was fair." State v. Joyner, 286 N.C. 366, 211 S.E.2d 320, appeal dismissed, 422 U.S. 1002, 95 S. Ct. 2618, 45 L. Ed. 2d 666 (1975).

IV. MATTERS RELATING TO TAXATION.

Classification for Tax Purposes. —

In accord with 2nd paragraph in original. See Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

In accord with 3rd paragraph in original. See Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

When Courts Will Interfere with Tax Assessments. — It is only when the actions of the State Board of Assessment are found to be arbitrary and capricious that courts will interfere with tax assessments because of asserted violations of the due process clause. Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972).

A sales tax on retailers who sell merchandise through vending machines (including items sold for less than ten cents where it is impossible to recoup the tax from the purchaser) does not violate constitutional provisions relating to due process and equal protection. Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972).

V. ILLUSTRATIVE CASES.

Preservation of Historical Structures. — The police power encompasses the right to control the exterior appearance of private property when the object of such control is the preservation of the State's legacy of historically significant structures. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

The right to travel upon the public streets of a city is a part of every individual's liberty, protected by the law of the land clause of the Constitution of North Carolina. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

But Curfew May Be Imposed Where Danger Is Clear and Present. — Where the danger is clear and present, the Constitution of the United States and Constitution of North Carolina do not forbid city authorities to declare a state of emergency and to proclaim and enforce a temporary, night-to-night, city-wide curfew, with specified exceptions for emergency and necessary travel. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Violations of Motor Vehicle Laws as Crimes. — The bases for the inclusion of violations of motor vehicle and traffic laws within the scope of the due process rule permitting punishment of persons for certain crimes related to public welfare or safety, even when such persons are without knowledge of the facts making an act criminal, are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon the roads and (2) the punishments for such violations are usually a small fine. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

The due process rule permitting punishment for certain crimes related to public welfare or safety, even when persons convicted of these crimes are without knowledge of the facts making the act criminal, is not to be extended beyond petty offenses involving light punishment nor to any crime involving moral delinquency. Watson Seafood & Poultry Co. v. George W. Thomas, Inc., 289 N.C. 7, 220 S.E.2d 536 (1975).

Statute requiring action for malpractice in performance of professional services for

a minor to be brought before minor attains age of 19 when three-year limitation of § 1-15(c) expires before minor attains age of 19 does not violate equal protection clauses of the North Carolina or United States Constitutions because a person has three years after reaching the age of 18 in which to bring other types of tort actions, since there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims. Hohn v. State, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

The sterilization of mentally ill or retarded persons under §§ 35-36 through 35-50, inclusive, is a valid and reasonable exercise of the police power. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 through 35-50, inclusive, provide a sufficient judicial standard and are not unconstitutionally vague or arbitrary. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Since the North Carolina law applies equally to all those named, §§ 35-36 through 35-50, inclusive, do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Sections 35-36 and 35-37 do not violate the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under § 35-36 is not a criminal proceeding. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

State interests in the sterilization of mentally ill or retarded persons rise to the level of a compelling State interest. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The statutory scheme of Chapter 14, Article 36A is not unconstitutional in contravention of this section. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970), aff'd, 277 N.C. 484, 178 S.E.2d 449 (1971).

The notice of foreclosure by sale as provided for in a deed of trust and as required under § 45-21.17 was held sufficient to meet the minimum due process requirements. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

Special Use Permit. — Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. Kenan v. Board of Adjustment, 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

Provision of county sign ordinance requiring nonconforming uses to be discontinued within three years from effective date of ordinance, thus giving the owner of a nonconforming sign a three-year period in which to amortize or depreciate the cost of the sign, is reasonable and does not provide for an unconstitutional taking of property. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

Inapplicability of County Sign Ordinance to City No Violation of Equal Protection. — A county sign ordinance does not violate the equal protection clause of the Fourteenth Amendment to the U.S. Constitution nor this section because the county will not enforce the ordinance with respect to any person owning or operating a sign in certain municipalities within the county, since counties may not exercise zoning authority within a city which has enacted a zoning ordinance and counties may defer from zoning within cities. County of Cumberland v. Eastern Fed. Corp., 48 N.C. App. 518, 269 S.E.2d 672, cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980).

Fee waiver policy adopted by city board of education was unconstitutional where it failed to establish a mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

Due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Confrontation and Cross-Examination Rights in Contempt Proceedings. — A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of this section, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony

the asserted violation is to be established, but the right is waivable. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980), aff'd in part and rev'd in part, 301 N.C. 561, 273 S.E.2d 247 (1981).

Public Censure of Attorney. — Where the evidence supported findings by the Disciplinary Hearing Commission that defendant attorney, in representing a client charged with driving under the influence of alcohol, advised a potential State's witness that his client claimed that the potential witness was driving the car at the time in question, that defendant advised the potential witness either not to appear in court or to plead the Fifth Amendment, and that defendant told the potential witness that his client would not testify against the witness if the witness would not testify against his client, the Commission's order of public censure was proper and it did not violate the defendant's right to due process and equal protection. North Carolina State Bar v. Graves, 50 N.C. App. 450, 274 S.E.2d 396 (1981).

Pretrial Discovery. — Section 1A-1, Rule 26(b), authorizing the pretrial discovery of the existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. Marks v. Thompson, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

Section 1A-1, Rule 26(b) is not unconstitutional on the grounds that it deprives property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or that it impairs the right to contract. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

The notice requirement of § 105-375 is not compelled by due process. Furthermore, due process having been satisfied by notice to the listing taxpayer as provided by § 105-375, the county is not required to shoulder the intolerable burden of directly notifying the heirs of a listing taxpayer who died prior to issuance of execution. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976), rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

The notice requirement of § 105-375 is not constitutionally compelled. Due process of law imports notice and an opportunity to be heard or defend in a regular proceeding before a competent tribunal. Due process was satisfied when the listing taxpayer was notified, at least two weeks prior to docketing a tax judgment, "that the judgment will be docketed and that execution will issue thereon in the manner provided by law." Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903 (1976), rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

There is no constitutional impediment to the collection of the sums sought by the State pursuant to § 143-117 for the period of confinement following defendant's acquittal by reason of insanity. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

The patient who is required to pay the "actual cost" of his treatment pursuant to § 143-117 is, in actuality, paying for services rendered to and received by him. This does not constitute a deprivation of property without just compensation. The patient receives treatment in return for his payments. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

Section 148-62 (now repealed) did not deprive a defendant of liberty other than by the law of the land in that it failed to provide adequate standards to guide the Board of Paroles in exercise of the discretionary power granted to it, as contended. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

Enjoining Expenditure of Public Funds for Corporation Not Created for Public Purpose. — If an act creating a corporation is unconstitutional as violative of N.C. Const., Art. V, § 2 and Art. I, § 19, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the general fund. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Former § 90-291 Unconstitutional. — See In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Prohibiting Certain Activities on Sunday. — A Sunday closing ordinance which singles out and bans the operation of billiard halls on Sunday but permits other businesses which provide facilities for recreation, sports and amusements, and which potentially are equally disruptive, violates the equal protection clauses of the North Carolina and United States Constitutions. State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972).

In order for a Sunday closing ordinance enacted by authority of former § 153-9(55) to withstand an attack upon its constitutionality as arbitrary or discriminatory, it is not necessary that the legislative body, in the same

ordinance, prohibit everything which is detrimental to the public morals, health or safety. State v. Atlas, 283 N.C. 165, 195 S.E.2d 496 (1973).

It is sufficient that there is reasonable basis for belief that the operation on the day of rest of the excepted businesses is necessary or conducive to the enjoyment by the public of the designated day as a day of rest, and that the activities of the defendant are not. State v. Atlas, 283 N.C. 165, 195 S.E.2d 496 (1973).

Unconstitutional discrimination in a county ordinance requiring businesses generally to be closed on a specified day of the week, designated by the legislative body as a day of rest, and exempting from such requirement certain types of business is not shown by the fact that the ordinance of some other county or municipality does not contain identical exemptions from its general closing requirement. State v. Atlas, 283 N.C. 165, 195 S.E.2d 496 (1973).

The regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public, rather than a particular class. North Carolina Ass'n of Licensed Detectives v. Morgan, 17 N.C. App. 701, 195 S.E.2d 357 (1973).

Health Insurance Can't Be Required of Insurer. — The State may not, consistent with the law of the land clause of this section, or the due process clause of the Fourteenth Amendment to the Constitution of the United States, require an insurance company to engage in the health care liability insurance business as a condition to its right to continue to carry on an entirely different business for which it is duly licensed by the State and in which it wants to be, and is, engaged. Hartford Accident & Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

Different Dismissal Procedures Do Not Deny Equal Protection. — It is not a denial of equal protection for the State to prescribe one procedure for the dismissal of a school teacher during the school year on the ground of immoral or disreputable conduct or failure to perform the teacher's contract, and to prescribe a different procedure for the termination of the employment at the end of the school year under former § 115-142. The vast difference in the consequences of these two actions, insofar as the future effect upon the teacher's professional standing and ability to obtain employment is concerned, is ample basis for classification within the limits of the Fourteenth Amendment and of this section. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971).

Written Notice of Right to Appeal Must Be Given to Permanent State Employee upon Dismissal. — Due process under the United States and North Carolina Constitutions requires that a permanent state employee who has been dismissed be provided with a statement in writing setting forth his rights of appeal before the 15-day and 30-day time limits for notice of appeal, provided in § 126-35 and § 126-38, commence to run. Luck v. Employment Security Comm'n, 50 N.C. App. 192, 272 S.E.2d 607 (1980).

Requirement of Teaching Certificate Renewal Is Reasonable. — A regulation of the State Board of Education which requires all teachers employed in the public school system of North Carolina to obtain a renewal of their teaching certificates every five years and prescribes for all teachers the same number of credits and the same methods for obtaining such credits does not deny equal protection of the law, notwithstanding that the regulation does not apply to employees of the Board who are not engaged in teaching whose duties are performed in the Board's offices. Since the purpose of requiring a certificate to teach is to assure good quality of performance in the classroom, there is an obvious and reasonable basis for making the rule applicable to those who teach and omitting from its applicability those who do not. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Nonattendance Domicile Requirement to Qualify for In-State Tuition. — The six-month nonattendance requirement to qualify for in-state tuition adds objectivity and certainty to the requirement of domicile. This is not obtained by placing an unreasonable burden on students. Petitioners are not barred by regulations of the Board of Trustees of the University of North Carolina from becoming domiciliaries of North Carolina. Nor are they barred from becoming eligible for in-state tuition. Rather, they are only required, if they want that status, to be domiciled in North Carolina for six months while not in the law school. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972); vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

That the Board of Trustees of the University of North Carolina might have chosen other objective indicators to test the domiciliary intent of applicants for in-state tuition is not to say the one chosen was unreasonable. That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972); vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Domiciliary Status of Women. — Under the regulations of the Board of Trustees of the University of North Carolina, domiciliary status is not equivalent to in-state tuition

status. Although a woman is deemed a domiciliary of North Carolina from the date of her marriage, to become eligible for in-state tuition, a married woman, just as any other student, has to establish actual residence in this State for six continuous months exclusive of the time spent while in attendance at an institution of higher education. The regulations place upon all students domiciled in North Carolina who wish to qualify for in-state tuition, regardless of sex, the burden of showing that they have been domiciled in North Carolina for six months while not in attendance at an institution of higher education, and did not deny to men similarly situated a benefit in violation of the equal protection clauses of the North Carolina and United States Constitutions. Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972), vacated on other grounds, 412 U.S. 947, 93 S. Ct. 2999, 37 L. Ed. 2d 999 (1973).

Subdivisions (a)(4) b and c of former § 28-174 allowing recovery for services rendered to decedent and for loss of society in a wrongful death action, were not unconstitutionally vague and therefore violative of this section. See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

The amendment to § 93A-2(a) enacted by Session Laws 1975, c. 108, is unconstitutional as repugnant to Art. I, §§ 1 and 19, of the Constitution of North Carolina. North Carolina Real Estate Licensing Bd. v. Aikens, 31 N.C. App. 8, 228 S.E.2d 493 (1976).

Section 14-72.2 violates the provisions of North Carolina Const., Art. I, § 19 and of the Fourteenth Amendment to the Constitution of the United States and accordingly, it is void. State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977).

A statute imposing criminal sanctions for the infliction of physical injury on children by their parents is not repugnant to this section. State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

The "nonsigner" provision of former § 66-56 was unconstitutional, insofar as it purported to extend to one not a party thereto the effect of a fair trade contract, because it deprived the nonsigner of liberty, contrary to the law of the land, in violation of this section. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Failure to provide a court reporter, where a court reporter was unavailable, is not fatal where there is no showing of prejudice. In re Custody of Cox, 24 N.C. App. 99, 210 S.E.2d 223 (1974), cert. denied, 286 N.C. 414, 211 S.E.2d 793 (1975).

Hearing Inadequate. — Where the county commissioners attempted to commission the sheriff as a special tribunal to conduct hearings on alleged violations of the ordinance, the provisions for revocation of licenses of massage parlors after a hearing before the sheriff did not afford the constitutionally required "opportunity to be heard or defend in a regular proceeding before a competent tribunal." Parker v. Stewart, 29 N.C. App. 747, 225 S.E.2d 632 (1976).

Exploration Tracking Rate Increases Not Violative of Due Process. — Exploration tracking rate increases were not in violation of equal protection by virtue of having been made without any attempt to determine which customers would benefit, since it was within the authority of the commission to determine that all gas ratepayers would benefit from increased supplies of natural gas, both through assured availability and improvement in the State's economy. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

The severe adverse economic effects sought to be avoided by approval and funding of exploration projects through tracking rate increases provided for by rule present a sufficient public concern to outweigh the infringement of ratepayers' freedom of contract, if any there be, arising from the rate increases ordered by the utilities commission. State ex rel. Utilities Comm'n v. Edmisten, 294 N.C. 598, 242 S.E.2d 862 (1978).

Granting Motion for Speedy Trial When Interests of Justice Require Continuance. — Having determined from evidence of the defendant's impaired mental capacity that the interests of justice required that the defendant's case be continued in order that the defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effective assistance of counsel, the trial court erred in allowing the case to proceed to trial upon the defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance, where no evidence was introduced before the trial court indicating that the defendant's impairments had subsided or no longer existed. Having determined that the interests of justice required a continuance, the action of the trial court in allowing the case to proceed to trial without evidence or findings that the impediments to those rights had subsided constituted a denial of those rights as well as the defendant's rights to due process of law and equal protection of the laws. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Session Law 1975, c. 269 Is Unconstitutionally Overbroad. — Chapter 269 of the 1975 North Carolina Session Laws, which prohibits the deliberate shining of an artificial light from a motor-driven conveyance beyond the surface of a roadway or in any field, woodland or forest in an area frequented or inhabited by wild game animals during certain

evening hours in specified counties violates due process because it is so overbroad as to constitute arbitrary and unreasonable interference with innocent conduct and it lacks any rational, real or substantial relation to the public health, morals, order, safety or general welfare. State v. Stewart, 40 N.C. App. 693, 253 S.E.2d 638 (1979).

Exemption under § 20-288(e). — The exemption of manufacturers and dealers of trailers of less than 4,000 pounds empty weight from the bonding requirement of § 20-288(e) does not deny plaintiff equal protection of the law, since, under North Carolina law, trailers weighing less than 4,000 pounds are exempt from brake requirements, directional signals, lighting requirements, and clearance lamps; smaller trailers cost less, are of simpler construction, and involve warranty problems of less magnitude; and the difference in treatment between trailers over 4,000 pounds and trailers less than 4,000 pounds therefore has a reasonable basis in relation to the purpose of the statute in question. Butler v. Peters, 52 N.C. App. 357, 278 S.E.2d 283, appeal dismissed, 303 N.C. 543, 281 S.E.2d 391 (1981).

The amendment to § 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive a party who was married before the amendment of a vested property right under the due process clause of the United States Constitution, Fourteenth Amendment, or the "law of the land clause" of this section. Sawyer v. Sawyer, 54 N.C. App. 141, 282 S.E.2d 527 (1981).

Sec. 20. General warrants.

Cross References. —
As to illegal searches in general, see note to §§ 15A-231, 15A-241.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Fourth Amendment Search and Seizure Requirements Compared. — Though the language in this section, providing in substance that any search or seizure must be "supported by evidence," is markedly different from that in the federal Constitution, there is no variance between the search and seizure law of North Carolina and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. State v. Hendricks, 43 N.C. App. 245, 258 S.E.2d 872 (1979), cert. denied, 299 N.C. 123, 262 S.E.2d 6 (1980).

Search Defined. — A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

Fact of Search Must First Be Established. — Before the legality of an alleged search may be questioned, it is necessary to first determine whether there has actually been a search. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

It does not prohibit seizure, etc. —

The constitutional and statutory guarantee against unreasonable search and seizure does not prohibit seizure of evidence and its introduction into evidence on a subsequent prosecution where no search is required. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

The constitutional guaranty against unreasonable searches and seizures does not prohibit a seizure of evidence without a warrant when no search is required. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

The constitutional guarantees against unreasonable search and seizure do not prohibit a seizure of evidence without a warrant when no search is required and the seized article is in plain view. State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Protection Extends Only to Unreasonable Searches. — Constitutional protection does not extend to all searches and seizures, but only to those which are unreasonable. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

The guarantees of this section protect against unreasonable searches and seizures. They are designed for the protection of the innocent. State v. Ellington, 284 N.C. 198, 200 S.E.2d 177 (1973).

Except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

The reasonableness of the search is in the first instance a substantive determination to be made by the trial court from the facts and

circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which apply that amendment. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

Unreasonable Search Defined. — North Carolina has defined an unreasonable search to be an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in the prosecution of a criminal action. State v. Turnbull, 16 N.C. App. 542, 192 S.E.2d 689 (1972).

All searches and seizures are not prohibited. The Constitution proscribes only those which are "unreasonable." State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

Evidence which is obtained as a result of an unreasonable search and seizure may not be admitted in either the State or federal courts. State v. Frederick, 31 N.C. App. 503, 230 S.E.2d 421 (1976).

Evidence obtained by an unreasonable search and seizure is inadmissible. State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Items in Plain View. — No search warrant is needed to seize items in plain view, and they are properly admitted into evidence. State v. Thompson, 15 N.C. App. 416, 190 S.E.2d 355, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972).

When police officers discover evidence of a crime in plain view, without the necessity of a search, they may seize the evidence without obtaining a search warrant. State v. Young, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

When police officers lawfully enter a person's premises and observe evidence of a crime in plain view, they may seize it without obtaining a search warrant. State v. Carr, 21 N.C. App. 470, 204 S.E.2d 892 (1974).

While conducting a lawful search, where officers found in plain view property identified as that reported missing, these items were lawfully seized. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

When contraband material is in plain view no search is necessary and the constitutional guarantee against unreasonable search and seizure does not prevent either the seizure of the contraband without a warrant or its introduction into evidence. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126, modified, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

By being lawfully on the premises officers are entitled to seize such evidentiary objects connected with defendants as are in plain view. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1975).

Evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

When Plain View Rule Applies. — The "plain view" rule does not apply unless the police have a right to be at the place where the evidence is discovered. State v. Young, 21 N.C. App. 369, 204 S.E.2d 556, cert. denied, 285 N.C. 595, 206 S.E.2d 867 (1974).

Car reasonably believed to be fruit, instrumentality or evidence of a crime can be seized whenever found in plain view. State v. Mitchell, 300 N.C. 305, 266 S.E.2d 605 (1980), cert. denied, 449 U.S. 1085, 101 S. Ct. 873, 66 L. Ed. 2d 810 (1981).

When the evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures. State v. Raynor, 27 N.C. App. 538, 219 S.E.2d 657 (1975).

When evidence is delivered to a police officer upon request and without compulsion or coercion, the constitutional provisions prohibiting unreasonable search and seizure are not violated. State v. Small, 293 N.C. 646, 239 S.E.2d 429 (1977).

Purpose of Particular Description. — The requirement that warrants shall particularly describe the things to be seized is to prevent the seizure of one thing under a warrant describing another and to leave nothing to the discretion of the officer executing the warrant in determining what is to be taken. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

General Warrants Unconstitutional. — The general warrant against which this constitutional provision speaks did not specify items to be searched for or persons to be arrested nor were they supported by showings of probable cause that any particular crime had been committed. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Warrants Proscribed. — This section proscribes warrants that empower officials to search for evidence of a particular offense without specifically naming the person against whom the offense is charged, the particular place to be searched or the items to be seized. Brooks v. Taylor Tobacco Enterprises, Inc., 39 N.C. App. 529, 251 S.E.2d 656, rev'd on other grounds, 298 N.C. 759, 260 S.E.2d 419 (1979).

Description of Books. — The particularity requirement is to be accorded the most scrupulous exactitude when the things are books, and the basis for the seizure is the ideas which they contain. When First Amendment rights are not involved, the specificity require-

ment is more flexible. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

Description of Narcotics Sufficient. — A warrant empowering officers to seize a limited class of things, i.e., unlawfully possessed narcotic drugs, is not prohibited. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The description in the search warrant was particular enough to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section where the affidavit upon which it was based referred only to "narcotic drugs, the possession of which is a crime" and did not describe the things to be seized with more particularity. State v. Foye, 14 N.C. App. 200, 188 S.E.2d 67 (1972).

The words "illegally held narcotic drugs" described the things to be seized with sufficient particularity to prevent the warrant from being a general search warrant within the prohibition of the Fourth Amendment to the Constitution of the United States and this section. State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, cert. denied, 279 N.C. 729, 184 S.E.2d 885 (1971).

Reference to Affidavit Held Sufficient Description. — Where an affidavit complied with the provisions of the applicable statute and met the constitutional standard of reasonableness and probable cause requisite to the issuance of a search warrant, the search warrant, by reference to the affidavit, which was made a part of the warrant, described with reasonable certainty the premises to be searched, sufficiently indicated the basis for the finding of probable cause, and sufficiently described the contraband for which the search was to be conducted. State v. Murphy, 15 N.C. App. 420, 190 S.E.2d 361 (1972).

Duty of Trial Court. — The trial court has a duty to pass upon the validity of a search and the competency of evidence procured thereunder when properly made the subject of inquiry. State v. Thompson, 15 N.C. App. 416, 190 S.E.2d 355, cert. denied, 282 N.C. 307, 192 S.E.2d 197 (1972).

Search of Automobiles and Other Conveyances. — Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Where the police officers are exercising proper precautionary measures, it is not error to complete the search of defendant's automobile at a scene more tranquil than that at which the arrest was made. State v. Hardy, 17 N.C. App. 169, 193 S.E.2d 459 (1972), cert. denied, 283 N.C. 107, 194 S.E.2d 635, 414 U.S. 999, 94 S. Ct. 352, 38 L. Ed. 2d 235 (1973).

Seizure of Non-Taxpaid Liquor Held Justified. — When officers saw the liquid in containers generally used to contain and transport non-taxpaid liquor, under the circumstances then existing, they had sufficient reasonable cause to believe that the jars contained non-taxpaid liquor to justify the seizure of the contraband without a search warrant. State v. Simmons, 278 N.C. 468, 180 S.E.2d 97 (1971).

Judge Issuing Search Warrant May Review Its Validity. — There is no statutory or constitutional proscription in North Carolina against a judge's presiding at a hearing to review the validity of a search warrant issued by that judge. State v. Brown, 20 N.C. App. 413, 201 S.E.2d 527, appeal dismissed, 285 N.C. 87, 204 S.E.2d 21 (1974).

Applied in State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979); State v. Warren, 59 N.C. App. 264, 296 S.E.2d 671 (1982).

Cited in State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975); Gooden v. Brooks, 39 N.C. App. 519, 251 S.E.2d 698 (1979); Brooks v. Taylor Tobacco Enterprises, Inc., 298 N.C. 759, 260 S.E.2d 419 (1979).

Sec. 21. Inquiry into restraints on liberty.

Legal Periodicals. — For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

CASE NOTES

Statute Prescribing Inmate Grievance Procedures Not in Conflict with Right to Habeas Corpus. — Section 148-113, requiring an inmate to exhaust his administrative remedies before he is entitled to judicial review of a grievance or complaint within the jurisdiction of the Inmate Grievance Commission, does not conflict with constitutional and statutory provisions guaranteeing the privilege of the writ of habeas corpus (this section and §§ 17-1 and 17-2), since § 148-113 only prescribes the method by which the inquiry into the lawfulness of an inmate's detention is to be conducted. Hoffman v. Edwards, 48 N.C. App. 559, 269 S.E.2d 311 (1980).

Restraint on Court's Power to Release Inmate Acquitted on Grounds of Insanity Is Invalid. — The power of the court to discharge a person acquitted of crime because of insanity upon habeas corpus cannot be made to depend solely upon certification by the superintendents of the several State hospitals that he is now sane and safe. Such a condition deprives the court of any exercise of judicial discretion and nullifies its power to release an inmate being illegally detained in a mental hospital. In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972).

Sec. 22. Modes of prosecution.

CASE NOTES

The purposes of this section and § 23 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

Valid Indictment Necessary. —

A valid indictment is essential to the jurisdiction of the court in a criminal case. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

In a criminal prosecution where no presentment or impeachment is involved and no waiver of indictment has been made, a valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

An indictment must clearly and positively identify the person charged with the commission of the offense; the name of the defendant, or a sufficient description if his name is unknown, must be alleged in the body of the indictment; and the omission of his name, or a sufficient description if his name is unknown, is a fatal and incurable defect. State v. Simpson, 302 N.C. 613, 276 S.E.2d 361 (1981).

An indictment is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense. The indictment must also enable the court to know what judgment to pronounce in case of conviction. State v. Lowe, 295 N.C. 596, 247 S.E.2d 878 (1978).

All of the essential elements of the offense must be alleged in an indictment charging a statutory offense. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

Use of Statutory Language. — An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

A preliminary hearing is not a constitutional requirement nor is it essential to the finding of an indictment. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Trial in Superior Court upon Original Accusation. —

In accord with 2nd paragraph in original. See State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 23 and this section for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Applied in State v. Brown, 21 N.C. App. 87, 202 S.E.2d 798 (1974); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979).

Stated in State v. Midyette, 45 N.C. App. 87, 262 S.E.2d 353 (1980).

Cited in State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981).

Sec. 23. Rights of accused.

Legal Periodicals. — For a note on the rape victim shield statute, see 3 Campbell L. Rev. 113 (1981).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

CASE NOTES

I. GENERAL CONSIDERATION.

The purposes of this section and § 22 of this Article are (1) to provide certainty so as to identify the offense, (2) to protect the accused from twice being put in jeopardy for the same offense, (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of guilty or nolo contendere, to pronounce sentence according to the rights of the case. State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

The common law does not recognize a right of discovery in criminal cases. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

When Motion for Continuance, etc. —

Ordinarily a motion for a continuance is addressed to the trial judge's sound discretion and his ruling is not subject to review on appeal in the absence of gross abuse. However, when the motion is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion, and the order of the court below is reviewable. State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

If a defendant's motion for a continuance in a criminal prosecution is based on a right guaranteed by the federal and State Constitutions, the question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

If a motion for a continuance is based upon a right guaranteed by either the United States or North Carolina Constitution, the issue is one of law and the decision of the lower court is reviewable by this court. State v. Beeson, 292 N.C. 602, 234 S.E.2d 595 (1977).

While a motion for continuance is ordinarily addressed to the sound discretion of the trial court, and the trial court's ruling is not subject to review absent abuse of discretion, if the motion is based on the constitutional right of confrontation, in that the refusal of the motion denied defendant a reasonable time within which to prepare and present his defense, the decision of the trial court is reviewable as a question of law. State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978); State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

Prejudicial Statements to Jurors. — In a capital case, any argument made by the solicitor, or by private prosecution appearing for the State, which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Defendant's contention that the district attorney's argument to the jury referring repeatedly to the fact that defense counsel was from another part of the State constituted prejudicial error and denied the defendant due process and the effective assistance of counsel was overruled where defense counsel had opened the door with abusive comments attacking the credibility of two State witnesses and the honesty of two local law-enforcement officers. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

To implement the constitutional rights under this section the General Assembly enacted former § 15-47. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Instruction Informing Jury of Death Sentence. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 19, 36 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Jurisdiction of Superior Court as to Specific Misdemeanors. — The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

One who is detained by police officers under a charge of driving while under the influence of an intoxicant has the same constitutional and statutory rights, including the rights given under N.C. Const., Art. I, § 23, as any other accused. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Destruction of Evidence Where Samples, Reports, etc., Preserved. — In prosecution under § 90-95, destruction of marijuana by State for lack of storage facilities, where State made random samples, photographs and a copy of the laboratory report available to defendants, did not violate defendants' rights of confrontation under this section, nor infringe defendants' due process rights under the federal and state constitutions. State v. Anderson, 57 N.C. App. 602, 292 S.E.2d 163, cert. denied, 306 N.C. 559, 294 S.E.2d 372 (1982).

Applied in State v. Williams, 18 N.C. App. 145, 196 S.E.2d 370 (1973); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State v. Maher, 54 N.C. App. 639, 284 S.E.2d 351 (1981); Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898 (1982); State v. Washington, 59 N.C. App. 490, 297 S.E.2d 170 (1982).

Stated in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981); State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Brock, 305 N.C. 532, 290 S.E.2d 566 (1982); State v. Newman, — N.C. —, 302 S.E.2d 174 (1983).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Hardy, 17 N.C. App. 169, 193 S.E.2d 459 (1972); State v. Lankford, 31 N.C. App. 13, 228 S.E.2d 641 (1976); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977); State v. Eatman, 34 N.C. App. 665, 239 S.E.2d 633 (1977); State v. Creech, 37 N.C. App. 261, 245 S.E.2d 817 (1978); State v. Evans, 40 N.C. App. 390, 253 S.E.2d 35 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979); State v. Sturdivant, 304 N.C. 293, 283 S.E.2d 719 (1981); State v. Davis, — N.C. App. —, 300 S.E.2d 861 (1983).

II. RIGHT TO BE INFORMED OF ACCUSATION.

Purpose. —

In accord with original. See State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

The purpose of the provision guaranteeing the right to be informed of the accusation is to enable the defendant to have a fair and reasonable opportunity to prepare his defense, to avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense and to enable the court, on conviction, to pronounce sentence according to law. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979).

A valid indictment is essential to the jurisdiction of the court in a criminal case. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

Indictment Must Allege All Essential Elements, etc. —

To implement the basic constitutional right that every person charged with crime has the right to be informed of the accusation, an indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

An indictment charging a statutory offense must allege all of the essential elements of the offense. State v. Crabtree, 286 N.C. 541, 212 S.E.2d 103 (1975).

The time fixed in a bill of indictment usually is not an essential fact, and the State may prove the crime was committed on another date. Time is not ordinarily of the essence of an offense, but when the State fixes the date in the indictment and the defendant presents evidence of an alibi relating to that date, time becomes of the essence. The State may not, after the defendant has presented his alibi evidence and rested his case, introduce evidence tending to show the defendant's commission of the crime charged on another date. To permit a conviction on such evidence would violate rights guaranteed by this section. State v. Vincent, 35 N.C. App. 369, 241 S.E.2d 390 (1978).

Sufficiency of Charging Offense, etc. —

An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In a prosecution for larceny, the property alleged to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978).

If an indictment charges the offense in a plain, intelligible and explicit manner and contains averments sufficient to enable the

court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Indictment for Larceny, etc. —

In an indictment for larceny the description "automobile parts . . . of one Furches Motor Company" sufficiently identifies the property alleged to have been stolen and this section and § 22 of this Article and their purposes. The description identifies the type of parts and the owner from whom they were taken. State v. Foster, 10 N.C. App. 141, 177 S.E.2d 756 (1970).

Where warrant which charged defendant with breaking and entering for the purpose of threatening to kill charged only a misdemeanor, and where he received his first notice that he was charged with breaking and entering with intent to commit larceny when the indictment was returned on the day of the trial, he was forced into a trial for which he was not allowed sufficient time to prepare his defense. State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975).

Kidnapping. — An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named is not defective or violative of N.C. Const., Art. I, § 22 and this section for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

III. RIGHT OF CONFRONTATION.

Federal Rights Applicable to States. — The right to the assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by this section and N.C. Const., Art. I, § 19. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

The right to face one's accusers and witnesses with other testimony is guaranteed by the Sixth Amendment to the federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by Art. I, §§ 19 and 23, of the Constitution of North Carolina. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976).

The right of confrontation is an absolute right rather than a privilege, and it must be afforded an accused not only in form but in substance. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Right of Cross-Examination Jealously Guarded. — One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Right Includes Opportunity, etc. —

A defendant has the constitutional right, in a criminal prosecution, to confront his accusers with other testimony. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

But the right to compulsory process is not absolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Applicable in Contempt Proceedings. — The North Carolina Constitution preserves the right of confrontation of the witnesses against an accused and this right is applicable to contempt proceedings so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

And to Prepare and Present Defense. —

Every defendant is entitled under the Constitution to have a reasonable opportunity to prepare his defense. This includes the right to consult with his counsel and to have a fair and reasonable opportunity, in the light of all attendant circumstances, to investigate, to prepare, as well as to present his defense. This right must be accorded every person charged with a crime. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

It is implicit in these constitutional guarantees that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense of the accused. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

No set length of time for investigation, preparation and presentation of defense is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. State v. Vick, 287 N.C. 37, 213 S.E.2d 335, appeal dismissed, 423 U.S. 918, 96 S. Ct. 228, 46 L. Ed. 2d 367 (1975).

It is implicit in the guarantees of assistance of counsel and of confrontation of one's accusers and witnesses that an accused have a reasonable time to investigate, prepare and present his defense. However, no set length of time for investigation, preparation and presentation is required, and whether defendant is denied due process must be determined upon the basis of the circumstances of each case. State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

Due process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony. State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

A criminal defendant is entitled to offer evidence in defense at trial, either through her own testimony or through the testimony of other witnesses. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

The right of a defendant to confront, etc. —

A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause, or that the witness is interested adversely to him in the outcome of the litigation. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Scope of cross-examination rests in discretion of the trial judge, and his rulings thereon will not be disturbed absent a showing of abuse of discretion. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980); State v. Moses, 52 N.C. App. 412, 279 S.E.2d 59, cert. denied, 303 N.C. 318, 281 S.E.2d 390 (1981).

But Undue Repetition, Argumentativeness and Peripheral Inquiry Should Be Banned. — While it is axiomatic that the cross-examiner ought to be allowed wide latitude, the trial judge has the responsibility to exercise his discretion in such a way that unduly repetitive and argumentative questioning, as well as inquiry into matters which are only peripherally relevant, are banned. State v. Royal, 300 N.C. 515, 268 S.E.2d 517 (1980).

Burden of Showing Denial of Right. — It is true that the constitutional right of confrontation includes the right to face the accusers and witnesses with other testimony, but the burden is on defendant to show a clear denial of this right. State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

Witnesses Must Be Present. — The right of confrontation confirms the common-law rule that, in criminal trials, the witnesses must be present and subject to cross-examination. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

A sufficient good faith effort to obtain the witness's presence at the trial must be shown to justify use of his prior testimony. State v. Biggerstaff, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Right to Compel Attendance of Witnesses Denied. — Having determined from evidence of the defendant's impaired mental capacity that the interests of justice required that the defendant's case be continued in order that the defendant could be granted the opportunity to seek compulsory attendance of witnesses and the effective assistance of counsel, the trial court erred in allowing the case to proceed to trial upon the defendant's motion for a speedy trial and for leave to withdraw his prior motions for a continuance, where no evidence was introduced before the trial court indicating that the defendant's impairments had subsided or no longer existed. Having determined that the interests of justice required a continuance, the action of the trial court in allowing the case to proceed to trial without evidence or findings that the impediments to those rights had subsided constituted a denial of those rights as well as the defendant's rights to due process of law and equal protection of the laws. State v. Brooks, 38 N.C. App. 445, 248 S.E.2d 369 (1978).

Disclosure of Informant Not Relevant Where Ample Independent Evidence of Guilt Exists. — Disclosure of the informant whose information led the police to the defendant would not be relevant or helpful to defendant where there is ample independent evidence of his guilt. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Prosecution's privilege to withhold the identity of an informer is founded upon public interest in effective law enforcement and its application turns on the facts of each particular case. State v. Ketchie, 286 N.C. 387, 211 S.E.2d 207 (1975).

Where defendant does not contend that the informant participated in or witnessed the alleged crime, he has no constitutional right to discover the name of the informant. State v. Ketchie, 286 N.C. 387, 211 S.E.2d 207 (1975).

The improper admission of evidence which violates the right to confrontation does not constitute prejudicial error unless there is a reasonable possibility that such evidence contributed to defendant's conviction. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

When an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Introduction of Transcribed Testimony Given at Former Trial of Same Offense. —

In accord with 1st paragraph in original. See State v. Biggerstaff, 16 N.C. App. 140, 191 S.E.2d 426 (1972).

Admission of Search Warrant and Affidavit. — It is error to allow a search warrant together with the affidavit to obtain search

warrant to be introduced into evidence because the statements and allegations contained in the affidavit are hearsay statements which deprive the accused of his rights of confrontation and cross-examination. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

In-Court Identification. — Where the evidence shows that the witness had a good and sufficient opportunity to observe a defendant at the time the offense was being committed, and testifies that his in-court identification is based on his observation made at that time, the test of "clear and convincing evidence" is met. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

If there is objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on voir dire that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Where nothing in the record indicates that the out-of-court photographic identification, which identified the defendant as the perpetrator of the crime, was unlawful and impermissibly suggestive, the in-court identification was not tainted by the out-of-court identification. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

The trial court properly determined that in-court identifications of defendant were not tainted by a pretrial photographic procedure, where the court found upon supporting voir dire evidence that the witnesses had ample opportunity to observe defendant during the course of the robbery in question; the in-court identifications of defendant were of independent origin based solely on what the witnesses saw at the time of the robbery and did not result from any out-of-court confrontation, photograph, or pretrial identification procedure; and the pretrial photographic procedures were not so unnecessarily suggestive as to lead to irreparable mistaken identification. State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Admission of Death Certificate Violated Due Process. — Defendant's right to confrontation and his right to fundamental fairness in a criminal trial guaranteed by due process were violated by the admission in evidence of the hearsay and conclusory statement in the victim's death certificate. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Out-of-Court Declarations. — Even when the right of confrontation is afforded to a defendant implicated in the out-of-court declarations of a codefendant, the prejudicial impact of testimony of the codefendant's declarations must be evaluated in the light of the competent evidence admitted against the nondeclarant defendant. The gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

Extrajudicial statements made by defendants which implicated a codefendant were not inadmissible where each declarant took the stand and testified that the substance of the statements attributed to him was false. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

Defendants' constitutionally protected rights of confrontation, due process, and equal protection were violated by the denial of their request to inspect what they contended was a written pretrial out-of-court statement by the State's witness. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Trial court's denial of defendant's motion for separate trial so prejudiced his defense as to amount to a denial of due process and his right to confrontation where defendant was precluded under the circumstances of the joint trial from introducing evidence of codefendant's out-of-court statement, which would have strengthened defendant's alibi defense. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Admission of Codefendant's Confession Inculpating Accused. — An accused's constitutional right of cross-examination is violated at his joint trial with a codefendant who does not testify, when the court admits the codefendant's confession inculpating the accused, notwithstanding jury instructions that the confession must be disregarded in determining the accused's guilt or innocence. State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974).

In joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or declarant; and if such deletion is not possible, the State must choose between relinquishing the confession or trying the defendants separately, assuming (1) that the confession is inadmissible as to the codefendant, and (2) that the declarant will not take the stand. State v. Heard, 285 N.C. 167, 203 S.E.2d 826 (1974).

Subsequent Conviction Lacks Due Process of Law. — Where the effect of a failure of the arresting officer and of the custodian of the arrested person to perform their respective duties is such as to deprive a person of the constitutional right to call for evidence in his favor, his subsequent conviction lacks the required due process of law and cannot stand. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Rights of Person Accused of Offense Involving Intoxication. — When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. Ordinarily a drunken man will "sleep it off" in a few hours. Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest. The statute says he is entitled to communicate with them immediately, and this is true whether he is arrested at 2:00 in the morning or 2:00 in the afternoon. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Appellant has the burden of showing not only error but also prejudicial error on appeal of trial judge's refusal to allow cross-examination of a witness. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Court May Not Forbid Defendant Appearing in Propria Persona to Offer Detrimental Evidence. — The trial court is not authorized to forbid a defendant appearing in propria persona to offer evidence, otherwise competent, for the reason that, in the judgment of the court, however sound, such evidence would be detrimental to the defendant. The defendant, whether represented by counsel or appearing in propria persona, is entitled to use his own judgment as to the wisdom of introducing otherwise competent evidence. To deny him this right is to deny him his constitutional rights afforded both by the Sixth Amendment to the Constitution of the United States and N.C. Const., Art. I, § 23. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

No Error in Quashing Defendant's Subpoena Where Defendant Never Showed Necessity for Compliance. — The trial court, in an armed robbery prosecution, did not err in allowing the state's motion to quash the defendant's subpoena for "all the sawed-off shotguns confiscated by the Greensboro Police Department" since the date of the robbery, since the defendant never stated why compliance with the subpoena was necessary to his defense, and the burden was on the defendant not only to show error but also to show that the error complained of affected the result adversely to him. State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

IV. RIGHT TO COUNSEL.

A defendant has a constitutional right, etc. —

Both the State and federal Constitutions secure to every man the right to be defended in all criminal prosecutions by counsel whom he selects and retains. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

Best Available Counsel, etc., Not Guaranteed. — The right to counsel does not guarantee the best available counsel, errorless counsel, or satisfactory results for the accused. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Fuller, 27 N.C. App. 249, 218 S.E.2d 515 (1975); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977).

Right Applies to Juvenile Proceedings. — In order to comply with due process in a juvenile delinquency proceeding, the right of the juvenile to be represented by an attorney must be considered and an attorney provided or there must be a proper waiver of this right. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

Failure to Appoint Counsel in Trial for Misdemeanors. — Defendant was not denied his constitutional right to counsel by failure of the trial court to appoint counsel to represent him in the consolidated trial of two misdemeanors where neither offense was a serious offense, notwithstanding that the maximum punishment for the two offenses could have been seven months. State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204, aff'd, 280 N.C. 137, 185 S.E.2d 152 (1971).

This right is not intended to be an empty formality. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

The right to counsel is not intended to be simply an empty formality, but is intended to guarantee effective assistance of counsel. State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978); State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Right Is to Effective Assistance of Counsel. — Constitutional right to counsel has long been recognized as an entitlement to the effective assistance of counsel. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Test of effective assistance of counsel is whether the assistance given was within the range of competence demanded of attorneys in criminal cases. State v. Vickers, 306 N.C. 90, 291 S.E.2d 599 (1982).

Counsel Must Have Opportunity to Investigate, Prepare and Present Defense. — Since the law regards substance rather than

form, the constitutional guaranty of the right of counsel contemplates not only that a person charged with crime shall have the privilege of engaging counsel, but also that he and his counsel shall have a reasonable opportunity in the light of all attendant circumstances to investigate, prepare and present his defense. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971); State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

The right to the assistance of counsel includes the right of counsel to confer with witnesses, to consult with the accused and to prepare his defense. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

Implicit in the constitutional right to effective counsel is that an accused and his counsel shall have a reasonable time to investigate, prepare and present the defense. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution and N.C. Const., Art. I, §§ 19 and 23, is denied unless counsel has adequate time to investigate, prepare and present his client's defense. Even so, no set time is guaranteed and whether a defendant is denied effective assistance of counsel must be determined upon the circumstances of each case. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Unless counsel suggests the existence of material witnesses or information that would possibly lead to material evidence or material witnesses, the mere failure to grant a continuance in order to make investigation would not, in and of itself, constitute a denial of effective assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

The constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required and whether defendant is denied due process must be determined upon the basis of the circumstances in each case. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

In a prosecution for kidnapping and assaulting a policeman with a firearm, the trial court erred in denying the defendant's motion for a continuance under circumstances in which the 17 days the defendant's counsel had to prepare for trial was not a reasonable time to comply with the defendant's constitutional right to assistance of counsel in his defense. State v. Moore, 39 N.C. App. 643, 251 S.E.2d 647, appeal dismissed, 297 N.C. 178, 254 S.E.2d 39 (1979).

It is implicit in the constitutional guarantees of assistance of counsel and confrontation of one's accusors and witnesses against him that an accused and his counsel shall have reasonable time to investigate, prepare and present his defense. However, no set length of time is guaranteed and whether defendant is denied due process must be determined under the circumstances of each case. State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

Determining Inadequacy of Representation. — The question of constitutional inadequacy of representation cannot be determined solely upon the amount of time counsel spends with the accused or upon the intensiveness of his investigation. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974).

Each case must be approached upon an ad hoc basis, viewing circumstances as a whole, in order to determine whether an accused has been deprived of effective assistance of counsel. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

It is not ipso facto a denial of effective assistance because counsel were notified of their appointment and on the same day learned that the cases would be called for trial the following day. State v. Alderman, 25 N.C. App. 14, 212 S.E.2d 205 (1972), appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

The mere fact that the defendant was convicted does not show that his counsel was either incompetent, neglectful or ineffective. State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977).

Even the most skilled counsel for the defense is not required to use dishonorable means, subterfuge or false testimony in order to confuse and mislead the court or the jury and thus procure a verdict favorable to the defendant. State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977).

The question of effective assistance of counsel involving the physical incapacity of counsel does not turn on the physical incapacity of counsel as such, since this may or may not deprive a defendant of effective representation. Rather, it is necessary to examine counsel's specific acts or omissions which the defendant alleges constitute a denial of effective assistance. The reviewing court must approach such questions ad hoc and in each case view the circumstances as a whole. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

The trial judge, who actually sees the lawyer's behavior, is better able than an appellate court to evaluate the overall effectiveness of representation. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Ineffective Representation Not Shown. — Defense counsel's failure to move for dismissal on the grounds of insufficient evidence at the close of all the evidence did not prejudice the defendant and did not constitute ineffective representation because the sufficiency of the evidence is reviewable on appeal without regard to whether a motion was made at trial. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Trial counsel's failure to move pursuant to § 15A-1225 for the exclusion of three State's witnesses from the courtroom until each one was called to testify is not evidence of ineffective assistance of counsel. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Where the record does not indicate any impermissibly suggestive pretrial identification procedures that would taint the witnesses' in-court identifications, defendant's counsel's failure to object or move for a voir dire examination is not indicative of ineffective representation. State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

Where the trial record disclosed that defendant's trial counsel presented evidence on defendant's behalf, entered objections to the state's evidence, and conducted effective cross-examination of the state's witnesses, the defendant's constitutional right to the effective assistance of counsel was not violated, since the general rule is that the caliber of an attorney's representation in a criminal prosecution is a denial of the constitutional rights of his client only when it is so lacking that the trial becomes a farce and a mockery of justice. State v. Jordan, 49 N.C. App. 561, 272 S.E.2d 405 (1980).

Delay in Appointment. — Where defendant was offered an opportunity to contact counsel, and he assured the officers he would seek his own counsel to assist him, and continued to assure the officers that he intended to employ private counsel, defendant's constitutional rights were not violated by the eight days' delay in appointment of counsel. State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Conduct of Defendant. — The conduct of a defendant in failing either to retain counsel or to avail himself of his right to court appointed counsel, if he were indigent, may make him solely responsible for any lack of trial preparation on the part of his counsel. State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978).

A defendant's right to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. State v. Poole, 305 N.C. 308, 289 S.E.2d 335 (1982).

Farce and Mockery of Justice Test. — The incompetency of counsel for the defendant in a criminal prosecution is not a constitutional denial of his right to effective counsel unless the attorney's representation is so lacking that the trial has become a farce and a mockery of justice. State v. Sneed, 284 N.C. 606, 201 S.E.2d 867 (1974); State v. Mathis, 293 N.C. 660, 239 S.E.2d 245 (1977); State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); State v. Roberts, 49 N.C. App. 52, 270 S.E.2d 559 (1980), appeal dismissed and cert. denied, 301 N.C. 726, 276 S.E.2d 286 (1981).

The refusal of a jailer to permit the defendant's attorney to confer with him while he was in jail is a denial of a constitutional right. State v. Hill, 9 N.C. App. 279, 176 S.E.2d 41 (1970), rev'd on other grounds, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to consult with friends and relatives and to have them make observations of his person. The right to communicate with counsel and friends necessarily includes the right of access to them. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The rights of communication go with the man into the jail, and reasonable opportunity to exercise them must be afforded by the restraining authorities. The denial of an opportunity to exercise a right is a denial of the right. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

And Are Not Limited to Receiving Professional Advice from Attorney. — Under this section a defendant's communication and contacts with the outside world are not limited to receiving professional advice from his attorney. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Appointment of Counsel for Limited Purpose of Furnishing Advice. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

The fact that a person is a defendant's lawyer, as well as his friend, does not impair his right to see the defendant at a critical time of the proceedings. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant is entitled to counsel at every critical stage of the proceedings against him. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

The guarantee of counsel only applies to "critical stages" of the prosecution, and what constitutes a critical stage is determined both from the nature of the proceedings and from the facts in each case. State v. Hall, 39 N.C. App. 728, 252 S.E.2d 100 (1979).

Although a defendant is granted a general right to counsel to assist in his or her defense, that right does not attach to all events leading to trial. The right attaches only to "critical" stages of the proceedings, those proceedings where the presence of counsel is necessary to assure a meaningful defense. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

Determining When Proceeding Is Critical Stage. — In deciding whether a particular proceeding constitutes a critical stage, courts must focus their inquiry on whether the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

The administration of a gunshot residue test is not a critical stage of the criminal proceedings to which the constitutional right to counsel attaches. State v. Odom, 303 N.C. 163, 277 S.E.2d 352, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 587 (1981), rehearing denied, 454 U.S. 1165, 102 S. Ct. 1041, 71 L. Ed. 2d 322 (1982).

A probable cause hearing is a "critical stage" of the criminal process entitling an indigent person to appointed counsel if he desires assistance of counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

What Constitutes Critical Stage Where Offense Involves Intoxication. — A critical stage has been reached in a defendant's case when, immediately after officers have interrogated the defendant and conducted their test for sobriety, they charge him with the offense of driving while intoxicated. The denial of counsel at this point makes it impossible for a defendant to have disinterested witnesses observe his condition and to obtain a blood test by a doctor — the only means by which defendant might prove his innocence. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

A defendant's guilt or innocence under § 20-138 depends upon whether he is intoxicated at the time of his arrest. His condition then is the crucial and decisive fact to be proven. Permission to communicate with counsel and friends is of no avail if those who come to the jail in response to a prisoner's call are not permitted to see for themselves whether he is intoxicated. In this situation, the right of a defendant to communicate with counsel and friends implies, at the very least, the right to have them see him, observe and examine him, with reference to his alleged intoxication. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Denial of Right Resulting in Irreparable Prejudice. — The denial of a request for permission to contact counsel as soon as a person is charged with a crime involving the element of intoxication, is a denial of a constitutional right resulting in irreparable prejudice to his defense. State v. Hill, 277 N.C. 547, 178 S.E.2d 462 (1971).

Right to Counsel at Pretrial Identification Proceedings. — A defendant has a constitutional right to presence of counsel during a pretrial identification only when adversary judicial criminal proceedings have been instituted against him prior to the confrontation. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Identification in One-Man Showup Conducted at Victim's Home. — The trial court properly admitted a burglary victim's in-court identification of defendant and evidence of the victim's identification of defendant in a one-man showup conducted at the victim's home within an hour after the crime and at a time when defendant was without counsel and had not waived counsel since (1) defendant was not entitled to counsel at the one-man showup because he was not in custody, (2) there is no reasonable possibility that the one-man showup could have led to a mistaken identification or contributed to defendant's conviction, and (3) the in-court identification of defendant by the victim was independent in origin and was not influenced by the showup. State v. Tann, 302 N.C. 89, 273 S.E.2d 720 (1981).

Defendant Entitled to Representation at Trial. — Where defendant had waived his right to have assigned counsel at the preliminary hearing, but made a specific request for a lawyer prior to the selection of the jury at his trial in the superior court, he was entitled to be represented by counsel. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

The trial judge must make an express finding as to defendant's indigent or nonindigent condition. State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Defendant is entitled to a detailed investigation into his economic situation. State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

When Defendant Prejudiced by Insufficient Inquiry. — Although it was incumbent upon the trial court to make a more sufficient inquiry into defendant's financial status and to determine the question of his indigency, defendant was not prejudiced unless he could show

that he did not voluntarily and intelligently waive counsel. State v. Pickens, 20 N.C. App. 63, 200 S.E.2d 405 (1973).

Facts Insufficient to Sustain Finding of Nonindigency at Time of Trial. — The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel, either privately or by court appointment, is not sufficient to sustain a finding that he was not indigent at the time of trial and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Waiver of Right. —

When the voir dire evidence is conflicting and contradictory on the question of whether a defendant waived his right to counsel, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Failure to ask for a lawyer does not constitute a waiver of a defendant's right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

When the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

A defendant in a criminal proceeding whether at trial or in pretrial proceedings may waive his right to counsel if he does so freely and understandingly and with full knowledge of his right to be represented by counsel. State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Indigent Defendant May Waive Right. — The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Determining Indigency. — The theory that right to counsel has been denied because of absence of definite standards for determining indigency has been rejected by the Court of Appeals. State v. Smith, 27 N.C. App. 379, 219 S.E.2d 277 (1975).

Defendant Has Right to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

A defendant on the trial of a criminal case, including a coram nobis proceeding at which the defendant is present and witnesses are to be examined and cross-examined, has a right to conduct and manage his own case pro se. The right to act pro se is a right arising out of the federal Constitution and not the mere product of legislation or judicial decision. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Defendant appearing pro se by his own choice does so at his peril and does not automatically become a ward of the court. State v. McDougald, 18 N.C. App. 407, 197 S.E.2d 11, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Rule Requiring Objection Applies to Unrepresented Defendant. — Unless necessary to obviate manifest injustice, the rule applicable to a represented defendant, that the admission of incompetent evidence alone is not ground for a new trial where there was no objection at the time the evidence was offered, applies equally to an unrepresented nonindigent defendant. State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

Defendant May Be Required to Reimburse State for Costs of Counsel. — A condition of probation requiring the defendant to reimburse the State for costs of court-appointed counsel does not infringe upon defendant's constitutional right to counsel. State v. Foust, 13 N.C. App. 382, 185 S.E.2d 718 (1972), overruled on another point, State v. Young, 21 N.C. App. 316, 204 S.E.2d 185 (1974).

Accused is constitutionally guaranteed counsel at an in-custody lineup identification. State v. Ingram, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

Accused must be warned of his right to counsel during a lineup. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

When counsel is not present at the lineup, testimony of witnesses that they identified the accused at the lineup is rendered inadmissible, and any in-court identification is also rendered inadmissible unless the trial judge first determines on a voir dire hearing that the in-court identification is of independent origin and is untainted by the illegal lineup. State v. Ingram, 20 N.C. App. 35, 200 S.E.2d 417 (1973).

Unless presence of counsel at a lineup is understandingly waived by the accused, testimony concerning the lineup must be excluded in absence of counsel's attendance. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Out-of-Court Examination of Photographs. — Right to counsel's presence is not extended to out-of-court examinations of photographs which include a suspect, whether he is in custody or at liberty. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Viewing Photographs. — An accused has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether the suspect is at liberty or in custody at the time. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

There are no set rules to determine whether a defendant has been deprived of effective assistance of counsel; rather each case must be approached upon an ad hoc basis, viewing circumstances as a whole in order to determine this question. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

Effective Legal Representation Provided. — Notwithstanding the defense attorney's hearing disability, his efforts and the assistance of co-counsel provided defendant with effective legal representation throughout the criminal proceedings. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

The question of alleged failure of counsel to render effective representation can be considered on direct appeal. State v. Hensley, 294 N.C. 231, 240 S.E.2d 332 (1978).

Right to Effective Assistance of Counsel not Denied. — In the absence of any showing that the withdrawal of a motion to consolidate for trial charges against two defendants in any way prejudiced defendant's case and denied him his right to effective counsel, there was no error in the denial of the motion to continue. State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977).

V. SELF-INCRIMINATION.

Scope of Protection. —

The protection against self-incrimination is not limited to admissions that would subject a witness to criminal prosecution; the privilege also extends to admissions that may only tend to incriminate. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The privilege afforded against self-incrimination not only extends to answers that would in themselves support a conviction under a criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The protection afforded by the privilege against self-incrimination does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Right to Remain Silent Is Possessed at All Times. — The right to remain silent does not arise when an arrestee is given his Miranda warnings. It is a right which he possesses at all times under the Fifth Amendment of the United States Constitution and under this section. State v. Lane, 46 N.C. App. 501, 265 S.E.2d 493, aff'd, 301 N.C. 382, 271 S.E.2d 273 (1980).

Privilege Protects against Only Real Dangers. — It is well established that the privilege against self-incrimination protects against real dangers, not remote and speculative possibilities, and a witness may not arbitrarily refuse to testify without existence in fact of a real danger, it being for the court to determine whether that real danger exists. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Liberal Construction. —

The constitutional guaranties against self-incrimination should be liberally construed. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

A defendant has a right not to be compelled to be a witness against himself in any criminal case. State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977).

Guaranty Extends to any Proceedings, etc. —

The privilege against self-incrimination may be exercised by a witness in any proceeding. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

The constitutional privilege against self-incrimination applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500, cert. denied, 298 N.C. 304, 259 S.E.2d 300 (1979).

Privilege Extends to Pleading Stage of Civil Action. — A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive

damages, and the privilege applies to protect a party from self-incrimination at the pleadings stage of an action. Therefore, in an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint claiming his constitutional privilege against self- incrimination, the trial court erred in deeming the allegations as admitted pursuant to Rule 8(d). Byrd v. Hodges, 44 N.C. App. 509, 261 S.E.2d 269 (1980).

Refusal to Answer Interrogatories in Civil Action for Punitive Damages. — That a plaintiff seeks punitive damages does not, ipso facto, entitle defendant to refuse, with impunity, to submit to the requested discovery, where the responses, whether individually or collectively, would not necessarily tend to subject defendant to a punitive damages award. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898 (1982).

All Involuntary Confessions or Incriminating Statements Ordinarily Inadmissible. — Although Miranda warnings are required only when defendant is being subjected to custodial interrogation and are not required during the investigatory stage when defendant is not in custody at the time he makes the statement, all involuntary confessions or incriminating statements, made in custody or out, are ordinarily inadmissible for any purpose. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Waiver of Privilege. —

A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him. State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977).

Defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

Defendant's silence in the rightful exercise of his privilege against self-incrimination may not be considered an admission of the truth of incriminating statements made in defendant's presence by a prospective State's witness in response to an officer's questions. State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974).

A defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Adverse comments on a defendant's failure to testify at trial are impermissible. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Defendant Testifying May Be Cross-Examined on In-Custody Statements. — A trial court may properly allow the solicitor to cross-examine defendant with reference to in-custody statements for the purpose of impeaching defendant's trial testimony, notwithstanding the fact that defendant was not represented by counsel and had not waived the right to counsel when the statements were made. State v. Nobles, 14 N.C. App. 340, 188 S.E.2d 600, cert. denied, 281 N.C. 626, 190 S.E.2d 472 (1972).

Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

The prosecutor's impeachment of defendant by cross-examining him about his failure to tell officers, while making an in-custody statement, that he was acting to protect himself from attack by deceased when he shot deceased did not violate defendant's rights under the Fifth or Fourteenth Amendments to the United States Constitution or this section or N.C. Const., Art. I, § 23. State v. Haith, 48 N.C. App. 319, 269 S.E.2d 205, appeal dismissed and cert. denied, 301 N.C. 403, 273 S.E.2d 449 (1980).

Testimony of Additional Criminal Conviction Elicited on Cross-Examination Relevant Impeachment Evidence. — Where the defendant on cross-examination testified about an additional conviction for assault with a firearm which he had failed to mention during his direct examination, this was relevant impeachment evidence, thus, it was not only proper, it was also prudent for the prosecutor to attempt to elicit further details about defendant's prior convictions. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Failure to Disclose Alibi Defense Prior to Trial Not an Inconsistent Prior Statement for Cross-Examination Purposes. — In a prosecution of defendant for possession and sale of heroin where defendant was arrested and taken to a police station, indictments were read to him, and defendant interrupted the reading to state that he had not sold heroin to the person named in the indictments, defendant's failure to disclose his alibi defense to the police officers then, or to some other person prior to trial, did not amount to an inconsistent statement in light of his in-court testimony relative to an alibi, and the district attorney's cross-examination of defendant concerning failure to disclose his alibi was sufficiently prejudicial to warrant a new trial. State v. Lane, 301 N.C. 382, 271 S.E.2d 273 (1980).

Identifying Physical Characteristics. — Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstra-

tions, even the body itself, are identifying physical characteristics and are outside the protection of the privilege against self- incrimination. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

Confessions. —

Where a defendant pleads drunkenness as a bar to the admissibility of his confession, unless defendant's intoxication amounts to mania — that is, unless he is so drunk as to be unconscious of the meaning of his words — his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, and is a question exclusively for the jury's determination. State v. McClure, 280 N.C. 288, 185 S.E.2d 693 (1972); State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

The fact that the technical procedural requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) are demonstrated by the prosecution does not, standing alone, control the question of whether a confession was voluntarily and understandingly made, but the answer to this question must be found from a consideration of the entire record. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

The ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975); State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975); State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Whether the conduct and language of investigating officers amounted to such threats or promises as to render a subsequent confession involuntary is a question of law reviewable on appeal. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

When the State offers a confession in a criminal trial and defendant objects, the competency of the confession must be determined by the trial judge in a preliminary inquiry in the absence of the jury. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975).

Trial judge's findings as to the voluntariness of a confession, and any other facts which determine whether it meets the requirements for admissibility, are conclusive if they are supported by competent evidence in the record. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 287 N.C. 262, 215 S.E.2d 622 (1975); State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

When there is no conflict in the evidence on voir dire, it is not error to admit a confession without making specific findings. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

If the State offers a part of a confession, the accused may require the whole confession to be admitted into evidence. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Admission of Confession Not Violative of Right against Self-Incrimination. — When a defendant has been given all warnings required by the State and federal rules of evidence, and he understands them, freely and voluntarily waives the right to have right to counsel, and freely and voluntarily makes a confession, then the admission of this confession in evidence at a jury trial does not violate defendant's right against self-incrimination. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 2d 104 (1974).

Where the trial court found that defendant was fully apprised of his rights to counsel and to remain silent, that he said he understood them, that he did not appear to be under the influence of drugs, and that he knew what he was doing, the trial court ruled correctly that his subsequent confession was admissible. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

An extrajudicial confession by an accused is admissible against him when it is voluntarily given, not induced by threats or fear, and when the defendant has knowingly and intelligently waived his right to have counsel present at the time the confession is given. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

In a prosecution for driving under the influence, the trial court did not err in admitting defendant's confession made to a police officer where the court found that defendant was properly advised of his rights; he knowingly waived his rights; he pointed to or told the officer of the wreck and described the location where he had the wreck; his answers to the questions were free, voluntary, and not coerced by the officer; and the fact that defendant was intoxicated at the time of his confession did not require its exclusion. State v. Spencer, 46 N.C. App. 507, 265 S.E.2d 451 (1980).

In-Custody Statements. —

Procedural safeguards effective to secure the privilege against self-incrimination are necessary whenever law-enforcement officers question a person who has been taken into custody or otherwise deprived of his liberty in any significant way. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

As a result of the decision in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966), a number of procedural safeguards must be employed prior

to an in-custody interrogation. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

In determining whether an in-custody statement is voluntarily and understandingly made, the trial court's findings of fact are conclusive on appeal if supported by competent evidence. State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975).

In a prosecution for armed robbery, the testimony of a witness employed as a dispatcher by the police department relating defendant's in-custody confession of guilt was admissible notwithstanding the dispatcher's failure to advise defendant of his constitutional rights, where the dispatcher questioned defendant while visiting a relative who shared defendant's cell, dispatcher was not in any way acting as a police officer and was not, in fact, a police officer. State v. Johnson, 29 N.C. App. 141, 223 S.E.2d 400, cert. denied, 290 N.C. 310, 225 S.E.2d 831 (1976).

When a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a voir dire hearing to determine whether the confession was voluntarily made and whether the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966) have been met. State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976).

Where defendant contended that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any in-custody statement involuntary, but where after an extensive voir dire hearing, the trial court found that defendant was not interrogated on the evening of his arrest because he was drunk, that defendant was not under the influence of intoxicating liquors or drugs and was furnished food and coffee when interrogated on the following day, that defendant was read his rights before questioning began, and that defendant signed a waiver of his rights, the in-custody statement was freely, understandingly and voluntarily made and was therefore properly admitted into evidence. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 429 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Admissibility depends upon whether the statement was freely and voluntarily made and whether the officers who elicited the statement employed appropriate procedural safeguards. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Question of voluntariness must be determined by the total circumstances of each particular case. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

If the totality of circumstances indicates that defendant was threatened, tricked, or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Defendant was tricked or cajoled into waiving his right to counsel and his privilege against self-incrimination, and his statements to a State Bureau of Investigation agent therefore were not voluntary, where the evidence tended to show that defendant and his attorney went to SBI headquarters in Raleigh for defendant to be given a polygraph examination; defendant and his attorney were told that the examination would consist of the polygraph test itself and an interrogation; they were also told that the attorney could not be present during the test phase but he would be allowed to be present during the interrogation phase; contrary to this advice, defendant's attorney was left outside the examination room during the test and the interrogation; the attorney, who could neither see nor hear what was transpiring, thought the testing phase was still in progress; and defendant himself apparently assumed that his lawyer would be admitted to the room at the proper time. State v. Stephens, 300 N.C. 321, 266 S.E.2d 588 (1980).

Silence in Face of Accusation, etc. — If police officers properly warn an accused of his constitutional rights, his silence may not be used against him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Where an arrestee is the focus of suspicion, has been held in custody for a significant period of time without being advised of his Miranda rights, is aware of his right to remain silent, and makes it clear that he is relying on his right to remain silent, that in-custody silence in the face of accusation and possible prosecution cannot be the subject of cross-examination. State v. Lane, 46 N.C. App. 501, 265 S.E.2d 493, aff'd, 301 N.C. 382, 271 S.E.2d 273 (1980).

Admissibility of In-Custody Silence for Purpose of Impeachment. — See State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975).

The privilege against self-incrimination can be claimed only by the witness, and when it is claimed, it is guaranteed by the Fifth Amendment to the Constitution of the United States, as well as by this section. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Plea of Guilty. — If a plea of guilty or nolo contendere is sustained, it must appear affirmatively that it was entered voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

A plea of guilty or of nolo contendere, unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated.

State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Evidence to the effect that a plea of nolo contendere was entered voluntarily and understandingly should have been developed fully and a finding to that effect made in order to safeguard defendant's rights, to protect his counsel from charges of unauthorized action, and generally to protect the plea and judgment from collateral attack in State post-conviction and federal habeas corpus proceedings. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Testimony Cured Failure to Inquire as to Voluntariness of Plea. — When the entire record was considered, a deficiency in the court's inquiries and in defendant's responses in determining whether the defendant's plea of nolo contendere was entered voluntarily and understandingly was cured by defendant's testimony on the occasion of his arraignment and plea which disclosed affirmatively that he had no defense to the crime for which he was indicted. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Court Determines Applicability of Immunity. — The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself. His say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified and to require him to answer if it clearly appears to the court that he is mistaken. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

And Applicability Depends upon Peculiarities of the Case. — If the witness, upon interposing his claim of immunity, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evidence from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. State v. Smith, 13 N.C. App. 46, 184 S.E.2d 906 (1971).

Forced Production of Incriminating Documents, etc. —

Defendant was not compelled to do anything. He voluntarily made and kept the records involved, and they were seized by lawful process without his being required to say or do anything. Although the constitutional privilege against self-incrimination applies to the production of papers so that if the accused is compelled to produce them the privilege is violated, lawful seizure of such evidence (as, for example, pursuant to a valid search warrant) obviously differs from requiring the accused to produce it and does not violate the privilege. State v. Downing, 31 N.C. App. 743, 230 S.E.2d 581 (1976).

Section 15A-977(a) requires an affidavit, but requiring the affidavit does not amount to compelling defendant to be a witness against himself in a criminal case in violation of the Fifth Amendment of the United States Constitution and North Carolina Const., Art. I, § 23. State v. Gibson, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

Court did not err in allowing into evidence "sanitized" versions of purported statements by codefendants which were inculpatory of each other. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

Questions of Law Reviewable on Appeal. — Whether conduct on the part of interrogating officers constitutes a threat or induces fear and whether a purported waiver has been knowingly and intelligently given are questions of law reviewable on appeal. State v. Ferrell, 46 N.C. App. 52, 264 S.E.2d 134 (1980).

A photograph of defendant taken while he was in jail in Virginia was not obtained in violation of his constitutional rights, where the officer who arrested defendant in Virginia had probable cause to stop the car in which the defendant was riding and arrest him without a warrant for the robbery of a grocery store in Virginia, and the trial court properly admitted in evidence the photograph and testimony concerning the photograph. State v. Allen, 301 N.C. 489, 272 S.E.2d 116 (1980).

Sec. 24. Right of jury trial in criminal cases.

Legal Periodicals. — For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

Common-Law Principle. — It is a fundamental principle of the common law, declared in Magna Charta and incorporated in this section, that no person shall be convicted of any crime but by the unanimous verdict of a jury in open court. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Defendant is entitled as of right, etc. — In accord with original. See State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Jury Must Have 12 Persons. — It is elementary that the jury provided by law for the trial of indictments is composed of 12 persons; a less number is not a jury. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

A verdict by 11 jurors is a nullity despite defendant's failure to assign his conviction by 11 jurors as error. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

If imprisoned under a sentence imposed after conviction by 11 jurors a defendant would be entitled to his release upon a writ of habeas corpus. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Not More. — If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations by more than 12. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Jury Trial Cannot Be Waived, etc. — It is rudimentary that a trial by jury in a criminal action cannot be waived by the accused in the superior court as long as his plea remains "not guilty." State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

When a defendant pleads not guilty in cases where a trial by jury is guaranteed by the organic law, he must be tried by a jury of 12 men, and he cannot waive it. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

But Plea of Guilty Renders Jury Unnecessary. — A defendant may plead guilty, or nolo contendere, or autrefois convict, and the impaneling of a jury is unnecessary. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Unanimous Verdict Required. — No person can be finally convicted of any crime except by the unanimous consent of 12 jurors who have been duly impaneled to try his case. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

To convict a defendant, the jurors must unanimously agree that the State has proven beyond a reasonable doubt each and every essential element of the crime charged. State v. Jordan, 305 N.C. 274, 287 S.E.2d 827 (1982); State v. McDougall, — N.C. —, 301 S.E.2d 308 (1983).

Unanimous Verdict Despite Initial Unresponsiveness. — Where the trial court, upon receiving an unresponsive answer to the question concerning the unanimity of the verdict, repeated the question and received a responsive and affirmative answer, there was no ambiguity in the announcement of the verdict and the defendant was convicted in the fashion provided for by the Constitution. State v. Coats, 46 N.C. App. 615, 265 S.E.2d 486 (1980).

Verdict of death in a capital case must be by unanimous vote of the 12 jurors. State v. Kirkley, — N.C. —, 302 S.E.2d 144 (1983).

Both N.C. Const., Art. I, §§ 24 and 25, and § 15A-2000 require all verdicts of the jury to be unanimous. State v. Kirkley, — N.C. —, 302 S.E.2d 144 (1983).

Poll of Jury. —

The right to have the jury polled is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise only a mode, more satisfactory to the prisoner, of ascertaining the fact that it is the verdict of the whole jury. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

By having the jury polled, a defendant can ascertain if there has been any misunderstanding of the requirement of unanimity by any juror. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The function of the jury poll is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

The purpose of polling the jury is to give each juror an opportunity, before the verdict is recorded, to declare his or her assent in open court, and enable the court to determine that a

unanimous verdict has been reached. State v. Davis, — N.C. App. —, 300 S.E.2d 861 (1983).

A defendant has a constitutional right, upon timely request, to have the jury polled as a corollary to his right to a unanimous verdict. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

Poll Defined. — A criminal defendant's right to have the jury polled is the right to have questions propounded to the jurors, individually, concerning whether each juror assented and still assents to the verdict tendered to the court. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

Only two questions are necessary to elicit whether the juror assented in the jury room and still assents in open court to the jury verdict. The first is: "Was this your verdict?" The addition of the second question "Is this now your verdict?" relates to the same time period addressed in the third question, "Do you still agree and assent thereto?" The second and third questions refer to the present in-court state of mind of the juror and serve only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

Not Required in Absence of Request. — In the absence of a request, a trial judge is not required to charge the jury that its verdict must be unanimous. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Right of Juror to Dissent. —

Any juror may dissent from a verdict, to which he has agreed in the jury room, at any time before it is received and entered up. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

Verdict Not Defective Where Juror Eventually Freely Assents. — A jury verdict is not defective if it appears that the juror eventually freely assented to the verdict. State v. Asbury, 291 N.C. 164, 229 S.E.2d 175 (1976).

A verdict is not defective if the juror understood that he or she has a right to dissent and eventually freely assented to the verdict. State v. Davis, — N.C. App. —, 300 S.E.2d 861 (1983).

Failure to Charge Jury That Verdict Must Be Unanimous. — Since the defendant has the right to have the jury polled, there is no apparent reason why the trial judge should be required in every case to instruct the jury that its verdict must be unanimous. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

A holding that failure of the trial judge to instruct the jury that its verdict must be unanimous is prejudicial error is unnecessary because in North Carolina a defendant has an absolute right to have the jury polled. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where the jury was polled and all jurors assented to the verdict in open court, defendant was assured that all jurors agreed with the verdict rendered, and the omission of the charge on unanimity was entirely harmless. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

A defendant has no vested right to a particular juror. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Exclusion of Age Group from Jury List. — The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September, 1971, the date of defendants' trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Challenge of Jurors for Opposition, etc. —

As to exclusion of jurors who voiced objections to death penalty, see State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Right to Reject Prejudiced Jurors. — When no systematic exclusion is shown, defendant's right is only to reject a juror prejudiced against him; he has no right to select one prejudiced in his favor. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

The erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Evidence of Racial Exclusion Insufficient. — Mere statement in defendant's brief that the systematic maneuverings of the prosecutor excluded people of defendant's race from jury which is not supported by the record fails to show that members of defendant's race were systematically or arbitrarily excluded from the jury panel. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Presence of an alternate in the jury room during the jury's deliberations violates this section and § 9-18 and constitutes reversible error per se. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975); State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976); State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If

the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

The presence of an alternate juror, either during the entire period of deliberation preceding the verdict, or his presence at any time during the deliberations of the 12 regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the defendant's counsel consented, or failed to object, to the presence of the alternate. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

At any time an alternate juror is in the jury room during deliberations he participates by his presence and, whether he says little or nothing, his presence will void the trial. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Separate Provisions for Petty Misdemeanors. —

The only exception to the rule that nothing can be a conviction but the verdict of a jury is the constitutional authority granted the General Assembly to provide for the initial trial of misdemeanors in inferior courts without a jury, with trial de novo by a jury upon appeal. State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Appellate Court May Increase Punishment in Trial De Novo. — Upon appeal from an inferior court for a trial de novo in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum. State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972).

Jury Trial Not Necessary in Action to Revoke Driver's License. — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Subsection (c) of § 15A-928 does not violate the right to jury trial embodied in Art. I, § 24 of the State Constitution. See State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976).

Clearing Courtroom During Testimony of Child Rape Victim. — In a prosecution for first-degree rape of a child, the constitutional right of defendant to a public trial was not violated by the court's order entered pursuant to § 15-166 that, during the testimony of the seven-year-old victim, the courtroom be cleared of all persons except defendant, defendant's family, defense counsel, defense witnesses, the prosecutor, the State's witnesses, officers of the court, members of the jury, and members of the victim's family. State v. Burney, 302 N.C. 529, 276 S.E.2d 693 (1981).

Applied in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Parker, 29 N.C. App. 413, 224 S.E.2d 280 (1976); State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980); State v. Deyton, 59 N.C. App. 326, 296 S.E.2d 497 (1982).

Quoted in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Hall, 305 N.C. 77, 286 S.E.2d 552 (1982).

Stated in State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981); State v. Davis, 305 N.C. 400, 290 S.E.2d 574 (1982).

Sec. 25. Right of jury trial in civil cases.

Legal Periodicals. — For a note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

CASE NOTES

Common Law. — The right to trial by jury guaranteed by this section applies only to cases in which the prerogative existed at common law or by statute in existence at the time the Constitution was adopted. In re Appeal of Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975).

This section preserves intact the right to trial by jury in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

The relevant date for determining the scope of the constitutional right to jury trial in civil cases is the date of adoption of the 1868 Constitution. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Right to a jury trial is guaranteed, etc. —

In accord with 2nd paragraph in original. See Mathias v. Brumsey, 27 N.C. App. 558, 219

S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

This section guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

This section has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Right Not Unqualified. —

In accord with 3rd paragraph in original. See In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972); In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

The constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury. Therefore the right to jury trial is not an impediment to directing a verdict for that party with the burden of proof where the credibility of the movant's evidence is manifest as a matter of law. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Similarity to First Sentence of Art. I, § 19 of Constitution of 1868. — The provisions of this section are similar to the provisions of the first sentence of Art. I, § 19 of the Constitution of 1868. In re Annexation Ordinance, 284 N.C. 442, 202 S.E.2d 143 (1974).

No Right to Jury Trial in Proceeding to Discipline Attorney. — This State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a judicial disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time the State Constitution was adopted, and is not now provided for by statute, an attorney's motion for a trial by jury is properly denied. In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33, appeal dismissed, 282 N.C. 426, 192 S.E.2d 837 (1972).

The legislature in 1969 had absolutely no intention of providing a constitutional right to jury trial for attorneys in disciplinary proceedings when it submitted this section to the people. North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Or in Action to Revoke Driver's License. — Since an action to revoke a driver's license is a civil action, jury trial is not necessary. State v. Carlisle, 20 N.C. App. 358, 201 S.E.2d 704 (1973), aff'd, 285 N.C. 229, 204 S.E.2d 15 (1974).

Or in Proceeding to Terminate Parental Rights. — The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

Insanity Proceedings. — The right to trial by jury did not exist at common law in insanity proceedings and is thus not required under this section. In re Appeal of Taylor, 25 N.C. App. 642, 215 S.E.2d 789 (1975).

How Jury Trial May Be Waived. — A party may waive his right to jury trial by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to § 1A-1, Rule 38(b). Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971).

It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

There can be no presumption of a waiver of trial by jury where such a trial is provided for by law. Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

Verdict of death in a capital case must be by unanimous vote of the 12 jurors. State v. Kirkley, — N.C. —, 302 S.E.2d 144 (1983).

Both N.C. Const., Art. I, §§ 24 and 25, and § 15A-2000 requires all verdicts of the jury to be unanimous. State v. Kirkley, — N.C. —, 302 S.E.2d 144 (1983).

A compulsory reference, under former § 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Applied in Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976), aff'd, 292 N.C. 192, 232 S.E.2d 687 (1977).

Stated in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Quoted in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Cited in Fogleman v. Fogleman, 41 N.C. App. 597, 255 S.E.2d 269 (1979).

Sec. 27. Bail, fines, and punishments.

Legal Periodicals. — For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

Punishment Is Province of Legislature. — It is within the province of the General Assembly and not the judiciary to determine the extent of punishment which may be imposed on those convicted of crime. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972). See also State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

In accord with 1st paragraph in original. See State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

In accord with 3rd paragraph in original. See State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971); State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

A sentence of imprisonment which is within the maximum authorized by statute is not cruel or unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Sellars, 52 N.C. App. 380, 278 S.E.2d 907, appeal dismissed and cert. denied, 304 N.C. 200, 285 S.E.2d 108 (1981).

A prison sentence which does not exceed the maximum authorized by statute is constitutionally valid. State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

When the sentence imposed is within statutory limits it cannot be considered excessive, cruel or unreasonable. State v. Harris, 27 N.C. App. 385, 217 S.E.2d 306 (1975).

Unless Punishment Provisions of Statute Itself, etc. —

In accord with original. See State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 2292, 29 L. Ed. 2d 861 (1971).

Sentences within the statutory limits that impose consecutive sentences do not constitute cruel and unusual punishment. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization is not a criminal proceeding within the meaning of this section. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The punishment provisions concerning armed robbery are constitutionally valid. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977).

Applied in Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); State v. Barrett, 58 N.C. App. 515, 293 S.E.2d 896 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978); State v. Overton, 60 N.C. App. 1, 298 S.E.2d 695 (1982).

Sec. 28. Imprisonment for debt.

Legal Periodicals. — For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

What Constitutes Debt. —
Taxes which are imposed are not contractual obligations of the taxpayer to the State, and do not constitute a debt within the meaning of the Constitution. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Section Only Applicable to Actions Arising out of Contract. — This section, which prohibits imprisonment for debt, is only applicable to actions arising out of or founded upon contract. State v. Locklear, 21 N.C. App. 48, 203 S.E.2d 63 (1974).

Provisions in probationary judgments which require restitution are constitutionally permissible if they are related to the criminal act for which the defendant is convicted. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981).

Payment of Restitution Is Valid Condition for Suspension of Sentence. — Subject to the prohibition contained in this section against imprisonment for debt, except in cases of fraud, payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for suspension of sentence. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Or for Acceptance of Plea Bargain. — Payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for acceptance of a plea bargain. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Restitution Must Be to Specific Party. — When restitution is ordered as result of a plea bargain it must be to a specific aggrieved party and this party must be named in the judgment. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

A party's activities in adding "payment in full" language to a check after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of § 1-410(4) and within this section, the North Carolina constitutional exception permitting imprisonment in case of fraud. Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217 (1980).

Specific performance of separation agreement. — The remedy of specific performance of a separation agreement contemplating enforcement by civil contempt proceedings is not available in this State. Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

Imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first-degree rape did not constitute cruel and unusual punishment since the sentences were authorized by statute. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Plaintiff was entitled to a decree of specific performance ordering defendant to comply with a separation agreement which had not been incorporated into a judicial decree because the available remedy at law for the enforcement of such agreement was inadequate. Moore v. Moore, 297 N.C. 14, 252 S.E.2d 735 (1979), reversing 38 N.C. App. 700, 248 S.E.2d 761 (1978).

Extra-judicial Separation Agreement Enforceable Only by Suit for Breach of Contract. — The enforcement of support payments provided in an extra-judicial separation agreement is accomplished as in the case of any other civil contract, i.e., through an action for breach of the contract seeking a judgment for sums due. Such an action, sounding in contract, is not enforceable by execution in personam in the form of imprisonment for civil contempt for noncompliance, by reason of the constitutional prohibition against imprisonment for debt. Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978).

Stated in Cobb v. Cobb, 54 N.C. App. 230, 282 S.E.2d 591 (1981).

Cited in Northwestern Bank v. Moretz, 56 N.C. App. 710, 289 S.E.2d 614 (1982).

Sec. 30. Militia and the right to bear arms.

CASE NOTES

Cited in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Sec. 32. Exclusive emoluments.

CASE NOTES

Exemptions Promoting General Welfare Are Not Forbidden. — This provision does not forbid all classifications of persons with reference to the imposition of legal duties and obli-

gations. Therefore, the limitation does not apply to an exemption from a duty imposed upon citizens generally if the purpose of the exemption is the promotion of the general welfare, as distinguished from the benefit of the individual, and if there is a reasonable basis for the legislature to conclude that the granting of the exemption would be in the public interest. Lamb v. Wedgewood S. Corp., — N.C. —, 302 S.E.2d 868 (1983).

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment is a grant to existing hospitals of exclusive privileges forbidden by this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Applied in Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982).

Cited in Loughlin v. North Carolina State Bd. of Registration, 32 N.C. App. 351, 232 S.E.2d 219 (1977); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 33. Hereditary emoluments and honors.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

Sec. 34. Perpetuities and monopolies.

CASE NOTES

The common-law rule, etc. —

The common-law rule against perpetuities has been long recognized and enforced in this jurisdiction, and its application has the continuing sanction of this section. North Carolina Nat'l Bank v. Norris, 21 N.C. App. 178, 203 S.E.2d 657 (1974).

Denying a nonprofit corporation the right to construct and operate its proposed hospital on its own property with its own funds with adequate staff and equipment establishes a monopoly in the existing hospitals contrary to the provisions of this section. In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973).

Plaintiff's Monopolistic Conduct Not Defense to Action Relating to Unfair Competition. — Even if plaintiff's conduct in protecting its property should be considered a monopolistic practice, it is not a defense to an action for injunctive relief and compensatory damages for alleged unfair competition where defendants' conduct has been determined to be unfair competition. United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973), cert. denied, 284 N.C. 255, 200 S.E.2d 653 (1974).

Section 20-305(5) is not unconstitutional on its face as allowing monopolies. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982).

Grant of franchise to automobile dealer is not an agreement between competitors not to compete, but a contract between a manufacturer and a dealer. The State has enacted legislation which gives automobile dealers some protection after they have made investments and taken other action, relying on contracts they have made. The State has the power to do this. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982).

Exclusive Automobile Dealer Franchise. — The State can require that if an automobile manufacturer gives a franchise to a dealer to sell automobiles, that the manufacturer include in the terms of the franchise agreement the right that the dealer have an exclusive franchise in a certain trade area so long as the dealer abides by the terms of the franchise agreement. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982).

Under § 20-305(5), an automobile manufacturer may give a dealer the exclusive right to sell its automobiles in a trade area without violating this section. For the General Assembly to require the manufacturer to do what it could bargain to do if it desired to execute a contract is not the granting of a monopoly. American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982).

Cited in Hajoca Corp. v. Clayton, 277 N.C.

560, 178 S.E.2d 481 (1971); North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 35. Recurrence to fundamental principles.

CASE NOTES

Cited in Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971); In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Sec. 36. Other rights of the people.

Instruction Informing Jury of Death Penalty. — Denial of defendant's written request for an instruction that "should you [the jury] return a verdict of guilty to the alleged crime of rape, the death penalty will be imposed by this Court" did not deny him his constitutional right of due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by N.C. Const., Art. I, §§ 19, 23 and this section, since the record revealed that each juror knew that the sentence of death would be imposed upon the return of a verdict of guilty. State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975).

Cited in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972).

ARTICLE II

LEGISLATIVE

Section 1. Legislative power.

Legal Periodicals. — For comment on sectarian education and the state, see 1980 Duke L.J. 801.

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

General Assembly Is Possessed of Full Legislative Powers. — Under the North Carolina Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

To Legislate for Protection of Health, Safety, Morals and General Welfare. — The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals and general welfare of the people. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

Questions of Public Policy Are for Legislative Determination. — Absent constitutional restraint, questions as to public policy are for legislative determination. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

The wisdom of an enactment is a legislative and not a judicial question. The General Assembly has the right to experiment with new modes of dealing with old evils, except as prevented by the Constitution. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Whether the public policy and program established by the North Carolina Housing Finance Agency Act (§ 122A-1 et seq.) is wise or unwise is for determination by the General Assembly. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Legislative function cannot be delegated. —

In accord with 2nd paragraph in original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The legislature may not delegate its power to make laws even to an administrative agency of the government. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Distinction between Delegating Power to Make Law and Conferring Authority as to Its Execution. — There is a distinction generally recognized between a delegation of the power to make a law, which necessarily includes a discretion as to what it shall be, and the conferring of authority or discretion as to its execution. The first may not be done, whereas the latter, if adequate guiding standards are laid down, is permissible under certain circumstances. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Effect of Section. — The effect of N.C. Const., Art. I, § 6 and this section is to elucidate the circumstances in which delegation of legislative powers is permissible. Heritage Village Church & Missionary Fellowship, Inc. v. State, 40 N.C. App. 429, 253 S.E.2d 473 (1979), aff'd, 299 N.C. 399, 263 S.E.2d 726 (1980).

Modern Legislatures May Delegate Limited Legislative Powers. — A modern legislature must be able to delegate — in proper instances — a limited portion of its legislative powers to administrative bodies which are equipped to adapt legislation to complex conditions involving numerous details with which the legislature cannot deal directly. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

From this section and from Art. I, § 6, of the State Constitution, derives the principle that the General Assembly may not delegate its power to any other department or body. This principle, however, is not absolute. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature the necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the determination of facts to which the policy as declared by the legislature shall apply. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Legislature May Delegate Portion of Power under Prescribed Standards. —

The people, in this section, have conferred their legislative power upon the General Assembly which may not transfer it to another officer or agency without the establishment of such standards for guidance so as to retain in its own hands the supreme legislative power. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

The legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

"Adequate Guiding Standards Required". — The constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Purpose of Test. — The purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Application of Test. — The key to an intelligent application of the adequate guiding standards test is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

When there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing

the expertise to adapt the legislative goals to varying circumstances. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 693, 249 S.E.2d 402 (1978).

Source of Standards. — In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. Such declarations need be only as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Determining Adequacy by Existence of Procedural Safeguards. — Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to insure that the decision-making by the agency is not arbitrary and unreasoned. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. The presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

But It Cannot Delegate Absolute Discretion to Apply, etc. —

In accord with original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

It Must Declare Policy, Fix Legal Principles, etc. —

In accord with original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973); Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974); State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Standards Are Unnecessary When Power Is Delegated in the Constitution. — The principle that the General Assembly may not transfer its legislative power without the establishment of standards for guidance has no application to a direct delegation by the people, themselves, in the Constitution of the State, of any portion of their power, legislative or other. In such case, the Supreme Court looks only to the Constitution to determine what power has been delegated. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Legislature Cannot Restrict Power of Succeeding Legislature. — An act of the General Assembly is legal unless the Constitution contains a prohibition against it. One legislature cannot restrict or limit by statute the right of a succeeding legislature to exercise its constitutional power to legislate in its own way. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1971).

Legislature May Delegate Power to Determine Facts. —

In accord with 3rd paragraph in original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

In accord with 4th paragraph in original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Where a municipal ordinance required the board of adjustment to issue a special use permit when it made certain affirmative findings specified in the ordinance, the board's determination of whether to issue a special use permit was not an unlawful exercise of legislative power. Kenan v. Board of Adjustment, 13 N.C. App. 688, 187 S.E.2d 496, cert. denied, 281 N.C. 314, 188 S.E.2d 897 (1972).

The General Assembly, having itself declared the policy to be effectuated and having established the broad framework of law within which it is to be accomplished and standards for the guidance of the administrative agency, may delegate to such agency the authority to make determinations of fact upon which the application of a statute to particular situations will depend. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend, or another agency of the government is to come into existence. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974); State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

It is not necessary for the legislature to ascertain the facts of, or to deal with, each case. Since legislation must often be adapted to complex conditions involving numerous details with which the legislature cannot deal directly, the constitutional inhibition against delegating legislative authority does not deny to the legislature that necessary flexibility of enabling it to lay down policies and establish standards, while leaving to designated governmental agencies and administrative boards the deter-

mination of facts to which the policy as declared by the legislature shall apply. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

Delegation of Power to Grant Professional or Occupational Licenses. — In licensing those who desire to engage in professions or occupations such as may be proper subjects of such regulation, the legislature may confer upon executive officers or bodies the power of granting or refusing to license persons to enter such trades or professions only when it has prescribed a sufficient standard for their guidance. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

Delegation of Authority to Test Applicants to Bar. — There is no more appropriate delegation of authority than that of testing to determine a capability to practice law. The legislative goal being the protection of the public interest by the maintenance of a competent bar, the determination of proficiency becomes a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required to make important policy choices which might just as easily be made by the elected representatives in the Legislature, but merely to compile and administer examinations. Form, grading and logistics only are left to the Board, which does no violence to constitutional principle. Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982).

Delegation of Power to Private Corporation. — The legislature may not vest in a private corporation the authority to determine "in its absolute or unguided discretion" the price at which another, with whom it has no contractual relation, may sell to a willing buyer an article lawfully acquired and owned by him. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

The "nonsigner" provision of former § 66-56, extending the force and effect of a "fair trade" contract to a seller not a party thereto, was unconstitutional, because it delegated legislative power to a private corporation, in violation of this section. Bulova Watch Co. v. Brand Distrib. of North Wilkesboro, Inc., 285 N.C. 467, 206 S.E.2d 141 (1974).

Power May Be Delegated to Municipalities. — Ordinary restrictions with respect to the delegation of power to an agency of the State, which exercises no function of government, do not apply to cities, towns, or counties. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

The general rule that legislative power, vested in the General Assembly, may not be delegated is subject to an exception permitting the delegation to municipal corporations and to counties of power to legislate concerning local problems. Porter v. Suburban San. Serv., Inc., 283 N.C. 479, 196 S.E.2d 760 (1973).

The General Assembly cannot delegate to a city or county more extensive power than it possesses. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

Though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the Constitution prohibits the creator from doing. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

The power to zone is the power originally vested in the General Assembly to legislate with reference to the use which may be made of land and the structures which may be erected or located thereon. Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971).

And Is Subject to Constitutional Limitation on Interference with Property Rights. — Power to zone rests originally in the General Assembly, but this power is subject to the constitutional limitation forbidding arbitrary and unduly discriminatory interference with the right of property owners. In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

Municipality May Not Delegate Power to Zone to Board of Adjustment. — The legislative body of a municipal corporation, in which the General Assembly has vested its power to zone, may not delegate the power to zone to the municipal board of adjustment. Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971).

Discretionary Right to Enlarge Corporate Limits. — In delegating to the town commissioners the discretionary right to decide whether to enlarge the corporate limits as specified in the special act, Session Laws 1971, c. 801, the General Assembly did not delegate legislative authority in violation of N.C. Const., Art. I, § 6 or this section. Except for approval by the town's board of commissioners, the act was complete in every respect at the time of its ratification. The only discretion given the commissioners was to decide whether or not to annex the territory specified in the act. In authorizing the annexation, the General Assembly determined that the annexation was suitable and proper. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

There is no constitutional provision prohibiting the creation of a municipality by an act of the General Assembly. A fortiori, by a special act, it may constitutionally enlarge the boundaries of a town which it has created. It

may also provide statutory procedures for extending the corporate limits of a municipality organized and existing under the laws of the State. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

The enlargement of municipal boundaries by the annexation of new territory, resulting in the extension of municipal corporate jurisdiction, is a legitimate subject of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature, and an act of annexation is valid which authorizes the annexation of territory without the consent of its inhabitants. Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972).

Standards Must Be Set Up for Administrative Board. —

When the General Assembly delegates to administrative officers and agencies its own power to prescribe detailed administrative rules and regulations governing the right of individuals to engage in a trade or profession, the statute granting such authority must lay down or point to a standard for the guidance of the officer or agency in the exercise of his or its discretion. Otherwise, such statute will be deemed an unlawful delegation by the General Assembly of its own authority. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

In the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), where the legislature declared the policy of the State, established the broad framework of law within which it is to be accomplished, and established standards and requirements which the Commission (now Department) was to observe in determining the eligibility of each proposed project for the contemplated financial aid, there was no delegation of legislative power such as would require the conclusion that the act, in its entirety, is unconstitutional. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Former § 90-57.1 contains no specific guidelines for the Board to follow. It merely refers to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

And Thus It Violates Section. — Without guidelines meeting the constitutional standards of certainty, former § 90-57.1 was an unlawful attempt to delegate legislative authority and was in violation of the North Carolina Constitution. Revco Southeast Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974).

Section 90-88 Contains More Than Adequate Legislative Guidelines. — An examination of § 90-88 reveals that the legislature has imposed guidelines upon the rescheduling of controlled substances that are more than adequate. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

And Is Proper Delegation of Authority to Determine Facts. — Section 90-88 does not delegate the authority to define crimes; rather it is a delegation of authority to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of a law is made to depend. State v. Lisk, 21 N.C. App. 474, 204 S.E.2d 868, cert. denied, 285 N.C. 666, 207 S.E.2d 759 (1974).

The burden of proof provision of the Rules Governing Admission to the Practice of Law provides for the orderly determination of an applicant's moral character, so that provision is within the legitimate rule-making power constitutionally delegated to the Board of Law Examiners in § 84-24. In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed, 423 U.S. 976, 96 S. Ct. 389, 46 L. Ed. 2d 300 (1976).

Chapter 143, Article 7 Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Exchange of Land by Board of Education. — There is nothing in the Constitution which prohibits a board of education from exchanging land which it owns for other land for school purposes. Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975).

The Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Proper to Delegate Authority to Plan and Construct Interstate Highway. — The delegation of authority to the North Carolina

Department of Transportation and the Board of Transportation to plan and construct an interstate highway did not constitute an unlawful delegation of legislative authority to an administrative body which was unrestrained by legislative standards or sufficient procedural safeguards or political accountability in violation of N.C. Const., Art. I, § 6 and this section. Orange County Sensible Hwys. & Protected Environments, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

Applied in Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Quoted in In re Certificate of Need for Aston Park Hosp., 282 N.C. 542, 193 S.E.2d 729 (1973); Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

Cited in In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978); Reed v. Byrd, 41 N.C. App. 625, 255 S.E.2d 606 (1979); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979). Harts Book Stores, Inc. v. City of Raleigh, 53 N.C. App. 753, 281 S.E.2d 761 (1981).

Sec. 2. Number of Senators.

Editor's Note. — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that Senators be chosen quadrennially.

Sec. 4. Number of Representatives.

Editor's Note. — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that Representatives be chosen quadrennially.

Sec. 8. Elections.

Editor's Note. — An amendment proposed by Session Laws 1981, c. 504, s. 1, and defeated at the election held June 29, 1982, would have provided that elections be held every four years.

Sec. 9. Term of office.

The term of office of Senators and Representatives shall commence on the first day of January next after their election. (1981 (Reg. Sess., 1982), c. 1241, s. 1.)

Editor's Note. —

Session Laws 1981 (Reg. Sess., 1982), c. 1241, s. 3, makes the amendment effective upon certification and applicable to members of the General Assembly elected in the 1982 general election, so that their terms began on January 1, 1983.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 2, 1982, substituted "on the first day of January next after their election" for "at the time of their election."

Sec. 11. Sessions.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

Sec. 20. Powers of the General Assembly.

CASE NOTES

Budget Process. — The Constitution mandates a three-step process with respect to the State's budget: (1) N.C. Const., Art. III, § 5(3), directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget ... for the ensuing fiscal period"; (2) this Article vests in the General Assembly the power to enact a budget (one recommended by the Governor or one of its own making); and (3) after the General Assembly enacts a budget, N.C. Const., Art. III, § 5(3), then provides that the Governor shall administer the budget "as enacted by the General Assembly." Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Quoted in Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820 (1981).

Sec. 24. Limitations on local, private, and special legislation.

Cross References. — As to prohibition against changing lines of school districts, see § 115C-70.

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For an article entitled, "A History of Liquor-By-The-Drink Legislation in North Carolina," see 1 Campbell L. Rev. 61 (1979).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

A statute is either "general" or "local," etc. —

In accord with original. See Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

What Are General Laws. —

For the purpose of determining whether an enactment is a general law intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied and the actual purpose to be accomplished. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Are Local Laws. —

A local act is an act applying to fewer than all counties, in which the affected counties do not rationally differ from the excepted counties in relation to the purpose of the act. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

A local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Courts Look Beyond Form, etc. —

In accord with original. See In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Classifications, etc. —

In accord with 6th paragraph in original. See Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

While substantial distinctions are essential in classification, the distinctions need not be scientific or exact. The legislature has wide discretion in making classifications. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Jurisdiction over Divorce. — Under this section jurisdiction over the subject matter of divorce is given only by statute. Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Meaning of "Trade". —

In accord with 3rd paragraph in original. See Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

In accord with 4th paragraph in original. See Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

"Trade" refers to a business venture for profit. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

Private profit is an inherent element of the concept of trade as used in subsection (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

A local act that authorizes or prohibits the sale of beer and wine is a local act regulating or governing a trade and is void. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

The retail sale of beer and wine is a "trade" within the meaning of this Constitution. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

Where substantial effect of local act is to regulate the sale of alcoholic beverages, its effect on trade is not merely incidental. Nelson v. North Carolina State Bd. of Alcoholic Control, 26 N.C. App. 303, 216 S.E.2d 152, appeal dismissed, 288 N.C. 242, 217 S.E.2d 666 (1975).

The purchase, sale and serving of alcoholic beverages by a licensed restaurateur constitutes "trade" within the meaning of subsection (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

Option to Sell Mixed Beverage Is Local Act. — A statute which authorized an election in Mecklenburg County to determine whether mixed beverages would be sold by the drink in that county was held to be a local act regulating trade and therefore unconstitutional and void as violative of subsection (1)(j) of this section. Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

Subdivision (55) of former § 153-9 is a home rule statute, applicable throughout the State. It enables the county commissioners of every county to enact ordinances in the exercise of the general police power within the prescribed territory just as other statutes enable the governing bodies of cities and towns to enact ordinances in the exercise of the general police power within their corporate limits. Such statutes are upheld as general laws and therefore valid notwithstanding that they regulate Sunday trade. Subdivision (55) of former § 153-9 is a general law and therefore does not contravene N.C. Const. 1868, Art. II, § 29. Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970).

As Is Session Laws 1945, Chapter 936. — Session Laws 1945, c. 936, which purports to grant discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of fortified and unfortified wines within the corporate limits of such municipalities, is a local act regulating trade in violation of subsection (1)(j) of this section. Food Fair, Inc. v. City of Henderson, 17 N.C. App. 335, 194 S.E.2d 213 (1973).

General laws regulating the change of a person's name, and prescribing a procedure therefor, do not abrogate the common-law rule which allows a person to change his name without resort to legal procedure or repeal it by implication or otherwise; they merely affirm and are in aid of the common-law rule and provide an additional method of effecting a change of name and, more importantly, provide a method for recording the change. In re Mohlman, 26 N.C. App. 220, 216 S.E.2d 147 (1975).

Session Laws 1967, c. 506, a local act relating to municipal eminent domain procedures, does not involve any of the forbidden subjects listed in this section. City of Durham v. Manson, 21 N.C. App. 161, 204 S.E.2d 41, modified on other grounds, 285 N.C. 741, 208 S.E.2d 662 (1974).

The Coastal Area Management Act of 1974 is a general law which the General Assembly had power to enact. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Quoted in Thompson v. Whitley, 344 F. Supp. 480 (E.D.N.C. 1972).

Cited in Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971); Variety Theatres, Inc. v. Cleveland County, 282 N.C. 272, 192 S.E.2d 290 (1972); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); Chem-Security Systems v. Morrow, — N.C. App. —, 300 S.E.2d 393 (1983).

ARTICLE III

EXECUTIVE

Section 1. Executive power.

CASE NOTES

Applied in Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Quoted in State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

Sec. 2. Governor and Lieutenant Governor: election, term, and qualifications.

(2) *Qualifications.* No person shall be eligible for election to the office of Governor or Lieutenant Governor unless, at the time of his election, he shall have attained the age of 30 years and shall have been a citizen of the United States for five years and a resident of this State for two years immediately preceding his election. No person elected to the office of Governor or Lieutenant Governor shall be eligible for election to more than two consecutive terms of the same office. (1977, c. 363, s. 1.)

Only Part of Section Set Out. — As subsection (1) was not changed by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 8, 1977, substituted "the office of the Governor or Lieutenant Governor" for "either of these two offices" and "to more than two consecutive terms" for "to the next succeeding term" in the second sentence of subsection (2).

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have rewritten the first sentence of subsection (1) to provide that the Governor and Lieutenant Governor would be elected at the places and on the day prescribed by law.

Sec. 4. Oath of office for Governor.

Legal Periodicals. — For an article entitled, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

Cited in Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Sec. 5. Duties of Governor.

(3) *Budget.* The Governor shall prepare and recommend to the General

Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures. This section shall not be construed to impair the power of the State to issue its bonds and notes within the limitations imposed in Article V of this Constitution, nor to impair the obligation of bonds and notes of the State now outstanding or issued hereafter. (1977, c. 690, s. 1.)

Only Part of Section Set Out. — As subsections (1) and (2) were not changed by the amendment, they are not set out.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 8, 1977 added the second paragraph of subsection (3).

CASE NOTES

When Expenditure under Subsection (3) Occurs. — An expenditure occurs only when funds are disbursed. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

The incurring of a contractual obligation does not constitute an expenditure within the meaning of subsection (3). Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

Budget Process. — The Constitution mandates a three-step process with respect to the State's budget: (1) this section directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period"; (2) N.C. Const., Art. II, vests in the General Assembly the power to enact a budget (one recommended by the Governor or one of its own making); and (3) after the General Assembly enacts a budget, this section then provides that the Governor shall administer the budget "as enacted by the General Assembly." Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Commutation of Sentence. — The exercise by a governor of his judgment, resulting in the commutation of the sentence of one man convicted of murder or rape and the refusal to commute the sentence of another convicted of such crime, cannot be called "freakish" or "arbitrary" merely because another governor might, theoretically, have reached opposite conclusions. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L.Ed.2d 1206 (1976).

Applied in State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975).

Quoted in Wilson v. North Carolina, 438 F.2d 284 (4th Cir. 1971); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788 (1971); State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978).

Sec. 7. Other elective officers.

Cross References. — As to vacancies in office of Superintendent of Public Instruction, see § 115C-18.

Proposed Amendment. — Session Laws 1983, c. 298, s. 1, proposes to amend this section by adding a new paragraph (7), to read as follows:

"(7) *Special Qualifications for Attorney General.* Only persons duly authorized to practice law in the courts of this State shall be eligible for appointment or election as Attorney General."

Session Laws 1983, c. 298, s. 3, provides that the amendment "shall be submitted to the

qualified voters of the State at the general election to be held in November 1984. That election shall be held and conducted under the laws then governing general elections in this State."

Session Laws 1983, c. 298, s. 4, provides for the form of the ballot.

Session Laws 1983, c. 298, s. 5 provides: "If a majority of the votes cast are in favor of the amendments set out in Sections 1 and 2 of this act, then the amendments shall be certified by the State Board of Elections to the Secretary of State, who shall enroll the amendments among the permanent records of his office, and the amendments shall become effective on January 1, 1985."

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "1980" for "1972" and "the Governor is" for "members of the General Assembly are" at the end of the first sentence of subsection (1) of this section and "statewide general election" for "election for members of the General Assembly" in subsection (3) near the beginning of the second sentence and near the end of the third sentence.

Legal Periodicals. — For article analyzing the scope of the North Carolina Insurance Commissioner's rate-making authority, see 61 N.C.L. Rev. 97 (1982).

For article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

Commissioner of Insurance. — Although the office of Commissioner of Insurance is one created by this section, his power and authority emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him. State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, — N.C. App. —, 300 S.E.2d 586 (1983).

Applied in State ex rel. Commissioner of Ins. v. North Carolina Auto. Rate Administrative Office, 287 N.C. 192, 214 S.E.2d 98 (1975).

Quoted in Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980).

ARTICLE IV
JUDICIAL

Section 1. Judicial power.

Legal Periodicals. — For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

Review of Acts of General Assembly. — The courts of this State have no inherent power to review acts of the General Assembly and to declare invalid those which the courts disapprove or, upon their own initiative, find to be in conflict with the Constitution. Green v. Eure, 27 N.C. App. 605, 220 S.E.2d 102 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 696 (1976).

Plaintiffs cannot obtain judicial review under § 150A-43 of their claim that § 143B-350(f)(8), conferring on the State Board of Transportation the power and duty to approve all highway construction programs, unconstitutionally delegates legislative power to the board, since the claim involves no agency "decision"; but such claim may be heard pursuant to this section. Orange County Sensible Hwys. & Protected Environments, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

Power to Require Public Officials to Act in Compliance with Duties. — The courts of this State have the power, pursuant to this section, to issue in personam orders requiring public officials to act in compliance with their ministerial or nondiscretionary public duties. Orange County Sensible Hwys. & Protected

Environments, Inc. v. North Carolina Dep't of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Judicial Functions in Criminal Cases. — The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilt, then to pronounce the punishment or penalty prescribed by law. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Grant of Discretionary Power to Parole Commission. — Section 148-62 (now repealed), insofar as it granted discretionary power to the Board of Paroles (now the Parole Commission), was not an assignment of judicial power to the Board of Paroles in contravention of this section and N.C. Const., Art. I, § 6. Jernigan v. State, 10 N.C. App. 562, 179 S.E.2d 788, aff'd, 279 N.C. 556, 184 S.E.2d 259 (1971).

The granting of parole and the supervision of parolees are purely administrative functions, and accordingly may be intrusted by the legislature to nonjudicial agencies. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Appeal from Administrative Decisions. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Applied in Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980); Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

Quoted in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 (1982).

Stated in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Cited in Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

Sec. 2. General Court of Justice.

CASE NOTES

Cited in Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Sec. 3. Judicial powers of administrative agencies.

Legal Periodicals. — For an article entitled, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Applied in Charlotte Liberty Mut. Ins. Co. v. State ex rel. Lanier, 16 N.C. App. 381, 192 S.E.2d 57 (1972).

Sec. 4. Court for the Trial of Impeachments.

CASE NOTES

Stated in In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978).

Sec. 8. Retirement of Justices and Judges.

The General Assembly shall provide by general law for the retirement of Justices and Judges of the General Court of Justice, and may provide for the temporary recall of any retired Justice or Judge to serve on the court or courts of the division from which he was retired. The General Assembly shall also prescribe maximum age limits for service as a Justice or Judge. (1971, c. 451, s. 1; 1981, c. 513, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 7, 1972 added the second sentence. Session Laws 1971, c. 451, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

The amendment adopted by the vote of the people at the election held June 29, 1982, inserted "or courts of the division" in the first sentence.

CASE NOTES

General Assembly Authorized to Deny Compensation to Judge Removed from Office for Wrongdoing. — The General Assembly acted well within its constitutional authority under this section when it provided in § 7A-376 that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Cited in Blackwelder v. State Dep't of Human Resources, — N.C. App. —, 299 S.E.2d 777 (1983).

Sec. 9. Superior Courts.

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "at the places and on the day prescribed by law" for "at the same time and places as members of the General Assembly are elected" at the end of the first sentence of subsection (3).

CASE NOTES

Appointment of Judges. — North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd,

409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Sec. 10. District Courts.

CASE NOTES

Stated in Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971).

Cited in State v. Greer, 58 N.C. App. 703, 94 S.E.2d 745 (1982).

Sec. 11. Assignment of Judges.

CASE NOTES

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

The system of rotating superior court judges does not deny a defendant due process of law because in a protracted trial, more than one judge might rule on the many motions. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Cited in Carr v. Great Lakes Carbon Corp., 49 N.C. App. 627, 272 S.E.2d 374 (1980).

Sec. 12. Jurisdiction of the General Court of Justice.

(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(1981, c. 803, s. 1.)

Only Part of Section Set Out. — As subsections (2) through (6) were not changed by the amendment, they are not set out.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held June 29, 1982, added the last sentence of subsection (1).

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For note analyzing possible constitutional barriers to judicial abrogation of contractual governmental immunity, see 12 Wake Forest L. Rev. 1082 (1976).

CASE NOTES

I. GENERAL CONSIDERATION.

Appeal from Administrative Decisions Generally. — The General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The principle that when the jurisdiction of a particular court is constitutionally defined the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution is grounded on the separation of powers provisions found in many American Constitutions, including the Constitution of this State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The court of appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

The constitutional and statutory structure of our General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must go first to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Review in Judicial Disciplinary Proceedings. — Under this section and § 7A-32 the courts of the appellate division have power to review judicial disciplinary proceedings whether the attorney or the State has prevailed in the trial court. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, the State may not appeal in such cases as a matter of right but must seek appellate review by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

The "clear and convincing" rule is the standard of proof that should be used in judicial disbarment proceedings. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Jurisdiction over Eastern Band of Cherokee in Civil Matters. — North Carolina has had civil jurisdiction over the Eastern Band of Cherokee at least since the emigration west following the Treaty of New Echota, when the Indians remaining in North Carolina became subject to the laws of the State. The fact that these Indians have since been recognized as an Indian tribe and brought under federal supervision did not remove the existing jurisdiction of the State of North Carolina. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Applied in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Quoted in Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

Stated in Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); In re Wharton, 305 N.C. 565, 290 S.E.2d 688 (1982).

Cited in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979); In re

Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981).

II. SUPREME COURT.

A. In General.

The jurisdiction of the Supreme Court, etc. —

In accord with original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The General Assembly is without authority to expand the appellate jurisdiction of the Supreme Court beyond the limits set in the Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

It Relates Solely to Appeals from Courts. —

In accord with 1st paragraph in original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

And Does Not Include Direct Appeals from Agencies. —

In accord with original. See Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court is strictly an appellate court, its jurisdiction limited "to review upon appeal any decision of the court below upon any matter of law or legal inference." Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has supervisory jurisdiction, etc. —

In accord with 2nd paragraph in original. See In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Under unusual and exceptional circumstances the court will exercise power under this section to consider questions which are not properly presented according to rules. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975).

Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice. State v. Stanley, 288 N.C. 19, 215 S.E.2d 589 (1975); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Section 15A-2000(d) is not unconstitutional as an impermissible expansion of the Supreme Court's jurisdiction. State v. Williams, 304 N.C. 394, 284 S.E.2d 437 (1981).

Direct Appeals from Utilities Commission Not Constitutionally Permissible. — The Utilities Commission being an administrative agency and not a part of the General Court of Justice, direct appeals from the Utilities Commission to the Supreme Court are not constitutionally permissible. State ex rel. Utilities Comm'n v. VEPCO, 21 N.C. App. 45, 203 S.E.2d 418, rev'd on other grounds, 285 N.C. 398, 206 S.E.2d 283 (1974).

Authority for a writ of error coram nobis stems from this section of the Constitution of North Carolina which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

The availability of a writ of error coram nobis in this State stems from § 4-1, which adopts the common law as the law of this State, and authority for the writ stems from this section which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds, Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

What Reviewable. —

Supreme Court must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Supreme Court has no authority to grant a new trial or other relief to a defendant convicted of a criminal offense in a trial free from an error of law for the reason that it disagrees with the jury concerning the credibility of a witness for the State. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Supreme Court has authority to review the record on appeal and to grant a new trial or give other appropriate relief for an error of law committed by the trial court. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L.Ed.2d 1216 (1976).

Writ of Error Coram Nobis. —

There is no justification for a rule that would require a person who is not in prison to obtain permission from an appellate court in order to file a petition for a writ of error coram nobis to attack collaterally a final judgment of a trial court from which no appeal was taken. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949), and State v. Daniels, 231 N.C. 509, 57 S.E.2d 653, cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L.Ed. 1366 (1950), imposed a new requirement upon the ancient common-law writ of error coram nobis, namely, a requirement that permission be first obtained from the Supreme Court, such permission to be granted under the supervisory power presently conferred upon the Supreme Court by subsection (1) of this section. The Supreme Court has concluded that such requirement is neither necessary nor desirable under present conditions with reference to a final judgment of a trial court from which there was no appeal. In this respect, Taylor, Daniels and State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970), are overruled. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971).

As to showing necessary for Supreme Court to grant writ of error coram nobis, see State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970), overruled on other grounds, Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971); Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

A writ of error coram nobis will not lie in the superior court after an appeal to the Supreme Court and an affirmation of the judgment in that court. Dantzic v. State, 10 N.C. App. 369, 178 S.E.2d 790, rev'd on other grounds, 279 N.C. 212, 182 S.E.2d 563 (1971).

B. Claims against State.

The Constitution no longer gives the Supreme Court original jurisdiction over claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court's jurisdiction over claims against the State is the same as its jurisdiction over all other claims. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

The Supreme Court has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Trial Court to Adjudicate Claims against State. — The appropriate trial court of the General Court of Justice now has original jurisdiction to adjudicate claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Issues of Fact. —

The Supreme Court's jurisdiction with respect to "issues" or "questions of fact" is exercised only in actions which are equitable in their nature, and in which relief is sought upon equitable principles. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Subsection (1) of this section, retaining the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" as it had existed prior to the 1971 revision, has no relation to the court's prior original jurisdiction over claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Repeal and Unconstitutionality of § 7A-25. — Even if the General Assembly did not intend to repeal § 7A-25 by ratification of the 1971 revision of N.C. Const., Art. IV, § 7A-25 is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Section 7A-25 was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Sec. 13. Forms of action; rules of procedure.

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Substantive Rights May Not Be Abridged. — Regardless of its "procedural" subject matter, no rule of procedure or practice may be applied to abridge substantive rights. Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980).

Authority of General Assembly. — The General Assembly has the final word on rules of practice and procedure in the trial courts of the State. State v. Campbell, 14 N.C. App. 596, 188 S.E.2d 558 (1972).

The General Assembly was without authority to enact subdivision (d)(6) of § 15A-1446, which permits appellate review of a contention that defendant was convicted under a statute that violates the United States Constitution or the North Carolina Constitution even though no objection, exception or motion on such ground was made in the trial division, since the statute violates the provisions of subsection (2) of this section giving the Supreme Court the exclusive authority to make rules of practice and procedure for the appellate division. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Governmental Immunity Not Abrogated. — A municipal corporation's governmental immunity against a claim for damages by a party wrongfully restrained or enjoined by the municipal corporation was not abrogated by the enactment of § 1A-1, Rule 65(c), providing that no security for payment of damages for wrongfully obtaining an injunction shall be required of the State or its political subdivisions, but that "damages may be awarded against such party in accord with this rule." Orange County v. Heath, 14 N.C. App. 44, 187 S.E.2d 345, aff'd, 282 N.C. 292, 192 S.E.2d 308 (1972).

Subsection (2) of this section would require a direct and positive declaration of policy, rather than a minute procedural change in § 1A-1, Rule 65 to abolish governmental immunity. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

The concept of sovereign immunity is so firmly established that it should not and cannot be waived by indirection or by procedural rule. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

Pretrial Discovery Does Not Infringe upon Rights. — Section 1A-1, Rule 26(b), authorizing the pretrial discovery of existence and contents of insurance, does not subject a defendant's property to unreasonable search and seizure or authorize the taking of a defendant's property without due process of law. Marks v. Thompson, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

Right to Request Jury Trial under § 50-10 Not Nullified. — Where the last pleading was filed nearly six months prior to the 1971 amendment of § 50-10, the amendment did not nullify the right to request a jury trial "prior to the call of the action for trial" conferred by § 50-10 at the time defendant filed the last pleading. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Applied in Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982).

Quoted in Simmons v. Textile Workers Union, 15 N.C. App. 220, 189 S.E.2d 556 (1972); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

Stated in State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

Cited in In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Sec. 14. Waiver of jury trial.

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Trial judge's findings of fact found to be based upon a misapprehension of applicable law will be set aside on the theory that the evidence should be considered in its true legal light. Security Ins. Group v. Parker, 289 N.C. 391, 222 S.E.2d 437 (1976).

Applied in Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973); Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975).

Quoted in Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Sec. 16. Terms of office and election of Justices of the Supreme Court, Judges of the Court of Appeals, and Judges of the Superior Court.

CASE NOTES

The one man, one vote rule does not apply to the State judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down the election procedure for superior court judges. A showing of an arbitrary and capricious or invidious action or distinction between citizens and voters would be required. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Appointment of Judges. — North Carolina could by her Constitution provide for the appointment of all State judges without violating any provision of the federal Constitution. The election of superior court judges is not a necessary characteristic of a republican form of government and is not required by the Constitution of the United States. This is a political rather than a judicial question. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Validity of Superior Court Election and Rotation Procedure. — There can be no doubt as to the validity under the federal Constitution of the provisions of the North Carolina Constitution requiring the election of superior court judges by districts or statewide as prescribed by the legislature, or that the State be divided into divisions and districts and judges rotate among the districts, or that they reside in their respective districts. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

A superior court judge is a hybrid official with both local and statewide functions and authority. The requirement that he reside in the district from which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and may be assigned beyond his division by the Chief Justice. Thus, there is a reasonable basis for the election procedure requiring him to be nominated in the primary election and elected in the general election by statewide vote and it serves and achieves a legitimate State purpose and is not arbitrary and capricious. Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 43, 34 L.Ed.2d 68 (1972).

Sec. 17. Removal of Judges, Magistrates and Clerks.

(1) *Removal of Judges by the General Assembly.* Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly. Any Justice or Judge against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least 20 days before the day on which either house of the General Assembly shall act thereon. Removal from office by the General Assembly for any other cause shall be by impeachment.

(2) *Additional method of removal of Judges.* The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(3) *Removal of Magistrates.* The General Assembly shall provide by general law for the removal of Magistrates for misconduct or mental or physical incapacity.

(4) *Removal of Clerks.* Any Clerk of the Superior Court may be removed from office for misconduct or mental or physical incapacity by the senior regular resident Superior Court Judge serving the county. Any Clerk against whom proceedings are instituted shall receive written notice of the charges against him at least 10 days before the hearing upon the charges. Any Clerk so removed from office shall be entitled to an appeal as provided by law. (1971, c. 560, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 7, 1972, substituted "Justice or Judge of the General Court of Justice" for "of the Supreme Court, Judge of the Court of Appeals, or Judge of the Superior Court" in the first sentence of subsection (1), inserted "by the General Assembly" in the third sentence of subsection (1), added present subsection (2) and redesignated former subsections (2) and (3) as (3) and (4) and deleted "District Judges and" preceding "Magistrates" in the catchline and in the text of present subsection (3).

Session Laws 1971, c. 560, s. 3, provides that the amendment shall be effective Jan. 1, 1973.

Legal Periodicals. — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Article 30 of Chapter 7A Constitutional. — In view of the constitutional mandate in subsection (2) of this section that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in subsection (1), respondent's contention that the General Assembly in enacting Article 30 of Chapter 7A abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, is without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article 30 of Chapter 7A is not unconstitutional because enacted in advance of the ratification of this section since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Judicial Standards Commission Act, Chapter 7A, Article 30, of the General Statutes, is constitutional and, under that Article, the Supreme Court is vested with jurisdiction to act in a case involving the removal from office of a judge. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Nor Does Supreme Court Action Pursuant to Such Authority Violate Constitution. — By accepting and acting upon the original jurisdiction authorized by the people under subsection (2) of this section and conferred by the legislature, the Supreme Court does not usurp power constitutionally reserved to another branch of government. Thus, the exercise of such jurisdiction does not violate the constitutional doctrine of separation of powers. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Tests of Misconduct. — The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice and that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to an inquiry into the conduct of a judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The disposition of cases for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Codes of judicial conduct may usefully be consulted to give meaning to the constitutional standards. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Subsection (1) Provides Only for Removal from Office. — When a justice or judge is removed for incapacity, this subsection (1) imposes no sanction other than removal from office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Purpose of Subsection (2). — The purpose of subsection (2) of this section is not so much to change the consequences of removal as it is to provide a "procedure in addition to impeachment and address" which will accomplish the goals which formerly could be accomplished only through the cumbersome and antiquated machinery of impeachment. It neither specifies a tribunal nor directs the creation of an authority for this purpose. It merely commands the legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient and impractical remedy of impeachment. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Subsection (2) of this section must be read in connection with the impeachment provisions of this article, which it was intended to supplement. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Provisions of Subsection (2) to Supplant Impeachment and Address. — Recognizing the need for a method of removal better than impeachment or address, the General Assembly, following the lead of many of the states, submitted subsection (2) as a constitutional amendment authorizing an additional method of removal of judges. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Supreme Court Granted Original Jurisdiction over Removal of Judges. — Ratification of the amendment adding subsection (2) carried with it an expression of the will of the people that the Constitution be amended so as to empower the legislature to confer upon the

Supreme Court original jurisdiction over the censure and removal of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

While subsection (2), which is a positive mandate to the legislature to provide a procedure in addition to impeachment for the removal and censure of judges and justices, does not expressly authorize the legislature to confer original jurisdiction upon the Supreme Court over the censure and removal of judges, by clear implication, it grants to the legislature authority to confer the jurisdiction upon the Supreme Court. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

"Mischief" to Be Cured. — The "mischief" to be cured by subsection (2) of this section was the inefficiency of removal proceedings under the impeachment and address provisions of the Constitution, not the remedies. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Disqualification Authorized. — Subsection (2) of this section authorizes the General Assembly to disqualify from holding further judicial office a justice or judge who has been removed for causes other than mental or physical disability. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Applied in In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

Quoted in In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); State v. Greer, 58 N.C. App. 703, 294 S.E.2d 745 (1982).

Cited in In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Sec. 18. District Attorney and prosecutorial districts.

(1) *District Attorneys.* The General Assembly shall, from time to time, divide the State into a convenient number of prosecutorial districts, for each of which a District Attorney shall be chosen for a term of four years by the qualified voters thereof, at the same time and places as members of the General Assembly are elected. The District Attorney shall advise the officers of justice in his district, be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district, perform such duties related to appeals therefrom as the Attorney General may require, and perform such other duties as the General Assembly may prescribe.

(1973, c. 394, s. 1.)

Only Part of Section Set Out. — As subsection (2) was not affected by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 5, 1974, substituted "prosecutorial" for "solicitorial" in the first sentence, and "District Attorney" for "Solicitor" in the first and second sentences of subsection (1).

Session Laws 1973, c. 394, s. 3, provides: "If a majority of the votes cast thereon are in favor of the amendment set out in section 1 of this act, then the Governor shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and the amendment shall become effective on the first day of the next succeeding month."

Proposed Amendment. — Session Laws 1983, c. 298, s. 2, proposes to amend this section by inserting a new second sentence between the present first and second sentences of paragraph (1), reading as follows: "Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a District Attorney."

Session Laws 1983, c. 298, s. 3, provides that the amendment "shall be submitted to the qualified voters of the State at the general election to be held in November 1984. That election shall be held and conducted under the laws then governing general elections in this State."

Session Laws 1983, c. 298, s. 4, provides for the form of the ballot.

Session Laws 1983, c. 298, s. 5, provides: "If a majority of the votes cast are in favor of the amendments set out in Sections 1 and 2 of this act, then the amendments shall be certified by the State Board of Elections to the Secretary of State, who shall enroll the amendments among

the permanent records of his office, and the amendments shall become effective on January 1, 1985."

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "at the places and on the day prescribed by law" for "at the same time and places as members of the General Assembly are elected" at the end of the first sentence of subsection (1).

Sec. 19. Vacancies.

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 504, and defeated at the general election held in 1982, would have substituted "statewide general election" for "election for members of the General Assembly" near the end of the first and second sentences and would have inserted "the" preceding "case of vacancies occurring therein" at the end of the third sentence.

CASE NOTES

Resignation Created Actual Vacancy. — Where a district court judge resigned upon the discovery of his legal infirmity under § 7A-4.20, his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under § 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under N.C. Const., Art. IV, § 19. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

Sec. 22. Qualification of Justices and Judges.

Only persons duly authorized to practice law in the courts of this State shall be eligible for election or appointment as a Justice of the Supreme Court, Judge of the Court of Appeals, Judge of the Superior Court, or Judge of District Court. This section shall not apply to persons elected to or serving in such capacities on or before January 1, 1981. (1979, c. 638, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held November 4, 1980.

Session Laws 1979, c. 638, s. 4, provides: "If a majority of the votes cast are in favor of the amendment set out in Section 1 of this act, then the amendment shall be certified by the State Board of Elections to the Secretary of State, who shall enroll the amendment among the permanent records of his office, and the amendment shall become effective on January 1, 1981."

OPINIONS OF ATTORNEY GENERAL

A layman serving as a District Court Judge on and prior to January 1, 1981, may resign or not seek reelection and still be qualified as a candidate for judge in a subsequent election under this section. See opinion of Attorney General to Honorable Arnold O. Jones, District Court Judge, Eighth District, 50 N.C.A.G. 107 (1981).

ARTICLE V

FINANCE

Revision of Article. — This Article was rewritten by amendment proposed by Session Laws 1969, c. 1200, s. 1, and adopted by vote of the people at the general election held Nov. 3, 1970. The amended article became effective July 1, 1973.

Section 1. No capitation tax to be levied.

No poll or capitation tax shall be levied by the General Assembly or by any county, city or town, or other taxing unit. (1969, c. 1200, s. 1.)

CASE NOTES

Chapter 143, Article 7, Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Sec. 2. State and local taxation.

(1) *Power of taxation.* The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

(2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

(3) *Exemptions.* Property belonging to the State, counties, and municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes, and, to a value not exceeding $300, any personal property. The General Assembly may exempt from taxation not exceeding $1,000 in value of property held and used as the place of residence of the owner. Every exemption shall be on a State-wide basis and shall be made by general law uniformly applicable in every county, city and town, and other unit of local government. No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it by this subsection.

(4) *Special tax areas.* Subject to the limitations imposed by Section 4, the General Assembly may enact general laws authorizing the governing body of any county, city, or town to define territorial areas and to levy taxes within those areas, in addition to those levied throughout the county, city, or town, in order to finance, provide, or maintain services, facilities, and functions in addition to or to a greater extent than those financed, provided, or maintained for the entire county, city, or town.

(5) *Purposes of property tax.* The General Assembly shall not authorize any county, city or town, special district, or other unit of local government to levy taxes on property, except for purposes authorized by general law uniformly applicable throughout the State, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.

(6) *Income tax.* The rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

(7) *Contracts.* The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only. (1969, c. 872, s. 1; c. 1200, s. 1.)

Editor's Note. — Pursuant to Session Laws 1969, c. 872, s. 7, and c. 1200, s. 7, subsection (6) of this section as rewritten by the amendment proposed by Ses-

sion Laws 1969, c. 872, s. 1, has been substituted for subsection (6) as rewritten by the amendment proposed by Session Laws 1969, c. 1200, s. 1. Subsection (6) as it appeared in Session Laws 1969, c. 1200, s. 1, was erroneously carried in the 1973 Supplement.

Legal Periodicials. — For an article entitled, "State Jurisdiction To Tax Tangible Personal Property," see 56 N.C.L. Rev. 807 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For an article entitled, "A Decade of Preservation and Preservation Law," see 11 N.C. Cent. L.J. 214 (1980).

For a note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

For survey of 1980 tax law, see 59 N.C.L. Rev. 1233 (1981).

CASE NOTES

I. POWER OF TAXATION GENERALLY; CLASSIFICATION.

A. General Consideration.

Editor's Note. — Some of the cases cited below were decided under this section as it stood before the revision of this Article by the amendment adopted Nov. 3, 1970, and effective July 1, 1973.

A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

A county board of elections does not have taxing power. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Subsection (1) is a limitation upon the legislative power, separate and apart from the limitation contained in the law of the land clause in N.C. Const., Art. I, § 19, and the due process clause of the Fourteenth Amendment to the Constitution of the United States. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Taxes and Local Assessments for Public Improvements Distinguished. — There is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. Southern Ry. v. City of Raleigh, 9 N.C. App. 305, 176 S.E.2d 21 (1970), aff'd, 277 N.C. 709, 78 S.E.2d 422 (1971).

Police Power Compared to Legislative Authority to Expend Tax Money. — The power of the State to regulate privately owned institutions under its police power is more extensive than the authority of the legislature to expend tax money for the accomplishment of the same purpose. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Requirement of "Public Purpose". — The "public purpose" requirement acts as a limitation equally upon the power to tax and the power to appropriate and expend public funds. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Meaning of "Public Purpose". —

A slide-rule definition to determine public purpose for all time cannot be formulated; the concept expands with the population, economy, scientific knowledge, and changing conditions. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

For a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

The term "public purposes" is employed in the same sense in the law of taxation and in the law of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to be leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

When Direct Disbursement of Public Funds to Private Entity Permissible. —

Under subsection (7) of this section direct disbursement of public funds to private entities is a constitutionally permissible means of accomplishing a public purpose provided there is statutory authority to make such appropriation. Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979).

Legislature Initially Determines What Is Public Purpose. — The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. If, however, an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary. When a constitutional question is properly presented, it is the duty of the court to ascertain and declare the intent of the framers of the Constitution and to reject any legislative act which is in conflict therewith. In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

Legislative Declaration Not Conclusive. — A legislative declaration which asserts in general terms that the statute under consideration is enacted for a public purpose, although entitled to great weight, is not conclusive. When the facts are determined, what is a public purpose is a question of law for the court. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Supreme Court Determines Constitutionality of Appropriation. — It is the duty and prerogative of the Supreme Court to determine whether an appropriation of tax funds is for a purpose forbidden by the Constitution of the State when that question is properly raised. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Tax Revenues May Not Be Used, etc. —

In accord with original. See Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The power to appropriate money from the public treasury is no greater than the power to levy the tax which put the money in the treasury. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

If an act creating a corporation is unconstitutional as violative of this section and Article I, § 19, of the Constitution of North Carolina, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and is void because the purpose for which the corporation was created is not a public purpose, then taxpayer may maintain an action to restrain state officials from paying to the corporation and the corporation from using money appropriated out of the General Fund. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

This section does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

The principles of equality and uniformity are indispensable to taxation, whether general or local. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity, in its legal and proper sense, is inseparably incident to the exercise of the power of taxation. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Compliance with Rule of Uniformity, etc. —

The requirements of "uniformity," "equal protection," and "due process" are, for all practical purposes, the same under both the State and federal Constitutions. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

State May Not Levy Tax in Some Counties and Exempt Others. — The Constitution does not permit a state to levy a tax which discriminates in favor of or against taxpayers in the same classification. The prohibition extends throughout the State. Hence, the State cannot levy a tax in 25 counties and exempt 75 counties. Nor can the State set up a valid scheme by which that precise result is accomplished. Thus, the additional sales tax authorized by the Local Option Sales and Use Tax Act is unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Requirement of Uniformity Extends to License, Franchise and Other Forms of Taxation. — Repeated judicial interpretations extend the requirement of uniformity to license, franchise, and other forms of taxation. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Although it is not expressly provided that the tax on trades, etc., shall be uniform, yet a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the Constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

License taxes must bear equally and uniformly upon all persons engaged in the same class of business or occupation or exercising the same privileges. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

When Tax Is Uniform. —

Taxing is required to be by a uniform rule — that is, by one and the same unvarying standard. Uniformity in taxing implies equality in the burden of taxation, and this equality of

burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity is defined to consist in putting the same tax upon all of the same class — that is, while the same tax must be enforced upon all innkeepers, upon railroads, and so throughout, a tax discriminating persons of the same class, whereby some are required to pay more than others, would lack uniformity. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Equality within the class or for those of like station and condition is all that is required to meet the test of constitutionality under subsection (2) of this section. A tax on trades, etc., must be considered uniform when it is equal upon all persons belonging to the prescribed class upon which it is imposed. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Under this section uniformity in taxation relates to equality in the burden of the State's taxpayers. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

A tax within the meaning of the constitutional prohibition against a nonuniformity of taxation is a charge levied and collected as a contribution to the maintenance of the general government. It is imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

The rule of uniformity is observed, etc. — With reference to locality a tax is uniform when it operates with equal force and effect in every place where the subject of it is found, and with reference to classification, it is uniform when it operates without distinction or discrimination upon all persons composing the described class. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Uniformity of taxation, as provided for by State Constitution, is required throughout the territorial limits of the taxing district. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Wide Latitude Accorded, etc. — In accord with original. See Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Reasonableness of Classification. — While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Applied in In re Appeal of Forsyth County, 285 N.C. 64, 203 S.E.2d 51 (1974); Master Hatcheries, Inc. v. Coble, 21 N.C. App. 256, 204 S.E.2d 395 (1974); North Carolina ex rel. Horne v. Chafin, — N.C. App. —, 302 S.E.2d 281 (1983).

Quoted in In re Southview Presbyterian Church, — N.C. App. —, 302 S.E.2d 298 (1983).

Stated in In re North Carolina Forestry Foundation, Inc., 35 N.C. App. 414, 242 S.E.2d 492 (1978); W.R. Co. v. North Carolina Property Tax Comm'n, 48 N.C. App. 245, 269 S.E.2d 636 (1980); In re McElwee, 304 N.C. 68, 283 S.E.2d 115 (1981); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); North Carolina Sav. & Loan League v. North Carolina Credit Union Comm'n, 302 N.C. 458, 276 S.E.2d 404 (1981); In re Chapel Hill Residential Retirement Center, Inc., — N.C. App. —, 299 S.E.2d 782 (1983).

B. Illustrative Cases.

Construction of Government Owned and Operated Hospital Is for Public Purpose. — It is well settled that the expenditure of tax funds for the construction of a hospital, to be owned and operated by the State, a county, a city, town or other political subdivision of the State, is an expenditure for a public purpose. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

But Construction of Privately Owned Hospital Is Not. — The expenditure of public funds raised by taxation to finance, or facilitate the financing of, the construction of a hospital facility to be privately operated, managed and controlled is not an expenditure for a public purpose and is prohibited by this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The construction and operation of a privately owned hospital is not necessarily for a public purpose, within the meaning of the constitutional limitation upon the use of tax funds, and the circumstance that the privately owned hospital is not operated for profit is not determinative. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Local Option Sales and Use Tax Act. — The additional 1% sales and use tax authorized

by the Local Option Sales and Use Tax Act was a State tax, not a county tax, and was unconstitutional since it was not uniformly applied to all taxpayers of the same class in all counties of the State. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

The levy imposed by the Local Option Sales and Use Tax Act was discriminatory in that it required one person to pay the tax involved and it exempted his competitor in a county which voted against the tax. Both Nash and Edgecombe were exempt if either voted against the tax. Uniformity is required. No provision was made for partial uniformity, and for that reason the tax authorized under former § 105-164.45 was unconstitutional. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Chapter 159A Violates Subsection (1). — The creation of county authorities for the purpose of financing pollution abatement and control facilities or industrial facilities for private industry by the issuance of tax-exempt revenue bonds is not for a public purpose and Chapter 159A, which purports to authorize such financing, violates subsection (1). Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

The interest of a county in collecting tax revenues under former § 105-281 was not within the zone of interest intended to be protected by this section; accordingly, that county could not contend that the provisions of former § 105-281 violated principles of uniformity. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

Chapter 143, Article 7, Is Not Unconstitutional in Contravention of This Section. — See State ex rel. Dorothea Dix Hosp. v. Davis, 27 N.C. App. 479, 219 S.E.2d 660 (1975), aff'd, 292 N.C. 147, 232 S.E.2d 698 (1977).

Charges under § 143-117 Not Unequal. — The charges pursuant to § 143-117 are not made for the support of the government, nor are they related to or limited by the necessities of government. They represent the actual cost of the care, treatment and maintenance of a particular patient. It is not unequal or unjust taxation, nor taxation at all, to require a man to be supported out of his own estate. State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977).

Household Property Tax. — Because there is some reasonable relationship between the value of a home and the value of the household property within, the percentage method is a reasonable one in accomplishing the object of determining the market value of household property, and thus there is no violation of subsection (2). In re Appeal of Bosley, 29 N.C. App. 468, 224 S.E.2d 686, cert. denied, 290 N.C. 551, 226 S.E.2d 509 (1976).

Education Is a Public Purpose. — Both appropriations and expenditures of public funds for the education of the citizens of North Carolina are for a public purpose. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Character of Object of Appropriation Determinative. — Even where it is clear that the promotion of a school such as the Dyslexia School of North Carolina, Inc. and its program will be of advantage to the community and the public welfare, it is the character of the school as the object of the appropriations and expenditures which must determine their validity. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Private Entity Ordinarily May Not Receive Public Expenditure. — Even though the Dyslexia School of North Carolina, Inc. as a private nonprofit corporation is engaged in a clearly benevolent activity, which would not be constitutionally prohibited if provided through the public schools of Gaston County, it remains a private entity. As such it may not receive appropriations and expenditures from public funds of Gaston County as a constitutionally permissible means of achieving the desirable and commendable end of assisting in the education of the dyslexic children of Gaston County. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Direct assistance to private entities such as the Dyslexia School of North Carolina, Inc., distinguishable from direct disbursements to students for educational purposes, may not be the means used to effect a public purpose. Hughey v. Cloninger, 37 N.C. App. 107, 245 S.E.2d 543 (1978), aff'd, 297 N.C. 86, 253 S.E.2d 898 (1979).

Annexation of Federal Air Force Base Constitutional. — The annexation of a federal Air Force base by the City of Goldsboro did not create unconstitutional tax classes. In re Ordinance of Annexation No. 1977-4, 296 N.C. 1, 249 S.E.2d 698 (1978).

II. EXEMPTIONS.

State-Owned Property Exempt Regardless of Purpose for Which Property Held. — Property owned by the State is exempt from ad valorem taxation by Art. V, § 2(3) of the Constitution of North Carolina, solely by reason of State ownership, and the statute requiring property owned by the State to be held exclusively for a public purpose in order to be exempt from taxation, § 105-278.1, is unconstitutional. Therefore, the Towns of Chapel Hill and Carrboro and the County of Orange may not assess ad valorem taxes against any property owned by the University of North Carolina, an

agency of the State, regardless of the purpose for which the property is held. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

Earlier Decision Misapplied. — The holdings of cases misapplying the holding of Atlantic & N.C.R.R. v. Board of Comm'rs, 75 N.C. 474 (1876), as mandating a "public purpose" requirement for exemption of state-owned property under the North Carolina Constitution — Board of Fin. Control v. County of Henderson, 208 N.C. 569, 181 S.E. 636 (1935); Town of Benson v. County of Johnston, 209 N.C. 751, 185 S.E. 6 (1936); Town of Warrenton v. Warren County, 215 N.C. 342, 2 S.E.2d 463 (1939); and City of Winston-Salem v. Forsyth County, 217 N.C. 704, 9 S.E.2d 381 (1940) — must be considered not in keeping with the rationale expressed in this case and in other opinions of the Court of Appeals. In re University of N.C., 300 N.C. 563, 268 S.E.2d 472 (1980).

Statute Exempting Certain Property from Assessments for Local Improvements. — Former § 160-521, exempting railroad right-of-way property from assessment for local improvements, was not unconstitutional on the ground it was not authorized by this section, since this section deals with the power of taxation and not with assessments for local improvements. Southern Ry. v. City of Raleigh, 9 N.C. App. 305, 176 S.E.2d 21 (1970), aff'd, 277 N.C. 709, 178 S.E.2d 422 (1971).

Property of North Carolina Housing Finance Agency. — Since Chapter 122A and the North Carolina Housing Finance Agency's activities pursuant thereto are for a public purpose, it is permissible for the General Assembly to exempt from taxation the property of the Agency and the obligations incurred by the Agency to effectuate such public purpose. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Bonds of North Carolina Housing Authority. — Since the tax-exempt feature makes possible the more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued, the General Assembly may exempt them from taxation by the State or any of its subdivisions. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

The property owned by the Medical Care Commission, including hospital facilities leased to private nonprofit associations for operation, is property owned by the State within the meaning of this constitutional provision, making the exemption of such property from taxation mandatory. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 3. Limitations upon the increase of State debt.

(1) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to contract debts secured by a pledge of the faith and credit of the State, unless approved by a majority of the qualified voters of the State who vote thereon, except for the following purposes:

(a) to fund or refund a valid existing debt;
(b) to supply an unforeseen deficiency in the revenue;
(c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;
(d) to suppress riots or insurrections, or to repel invasions;
(e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;
(f) for any other lawful purpose, to the extent of two-thirds of the amount by which the State's outstanding indebtedness shall have been reduced during the next preceding biennium.

(2) *Gift or loan of credit regulated.* The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association, or corporation, except a corporation in which the State has a controlling interest, unless the subject is submitted to a direct vote of the people of the State, and is approved by a majority of the qualified voters who vote thereon.

(3) *Definitions.* A debt is incurred within the meaning of this Section when the State borrows money. A pledge of the faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when the State exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(4) *Certain debts barred.* The General Assembly shall never assume or pay any debt or obligation, express or implied, incurred in aid of insurrection or rebellion against the United States. Neither shall the General Assembly assume or pay any debt or bond incurred or issued by authority of the Convention of 1868, the special session of the General Assembly of 1868, or the General Assembly of 1868-69 and 1869-70, unless the subject is submitted to the people of the State and is approved by a majority of all the qualified voters at a referendum held for that sole purpose.

(5) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

Legal Periodicals. — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

For article on the need to reform North Carolina property tax law, see 59 N.C.L. Rev. 675 (1981).

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

Power to Enter into Long-Term Contracts Not Restricted. — The intent of the provision of this section which prohibits the General Assembly from contracting debt without voter approval is to restrict the State's power to borrow money, not its power to enter into long-term contracts. Boneno v. State, 54 N.C. App. 690, 284 S.E.2d 170 (1981).

The method of financing set forth in § 122A-6 does not create a debt within the meaning of the Constitution and therefore the limitations of this section are inapplicable. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Authority to Establish Reserve or Contingency Fund Not Pledge of Faith and Credit. — The fact that such appropriations as the General Assembly may see fit to make may be used for the establishment of a reserve or contingency fund to be available for the payment of the principal of and the interest on any bonds or notes of a public corporation, does not constitute a pledge of the faith and credit of the State or of any political subdivision thereof for the payment of the principal of and the interest on any bonds or notes of the corporation. Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

When Issuance of Bonds Does not Constitute Lending or Giving of State Credit. — Where an act specifically provides that bonds or notes issued under it shall not be deemed to constitute a debt, liability or obligation of the State or of any political subdivision thereof, or a pledge of the faith and credit of the State or of any such political subdivision, but "shall be payable solely from the revenues and other funds provided therefor," the issuance of such bonds does not constitute a giving or lending of the credit of the State, or of its agency, within the meaning of this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Section 131-138 et seq. Does Not Violate Section. — Section 131-138 et seq., authorizing the Medical Care Commission (now Department of Human Resources) to issue revenue bonds to finance the construction of hospital facilities to be leased and ultimately conveyed to a public or private nonprofit agency, does not authorize the contracting of a debt by the State, or its agency, or lending of the faith and credit of the State, or its agency, in violation of this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Sec. 4. Limitations upon the increase of local government debt.

(1) *Regulation of borrowing and debt.* The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

(2) *Authorized purposes; two-thirds limitation.* The General Assembly shall have no power to authorize any county, city or town, special district, or other unit of local government to contract debts secured by a pledge of its faith and credit unless approved by a majority of the qualified voters of the unit who vote thereon, except for the following purposes:

(a) to fund or refund a valid existing debt;

(b) to supply an unforeseen deficiency in the revenue;

(c) to borrow in anticipation of the collection of taxes due and payable within the current fiscal year to an amount not exceeding 50 per cent of such taxes;

(d) to suppress riots or insurrections;

(e) to meet emergencies immediately threatening the public health or safety, as conclusively determined in writing by the Governor;

(f) for purposes authorized by general laws uniformly applicable throughout the State, to the extent of two-thirds of the amount by which the unit's outstanding indebtedness shall have been reduced during the next preceding fiscal year.

(3) *Gift or loan of credit regulated.* No county, city or town, special district, or other unit of local government shall give or lend its credit in aid of any person, association, or corporation, except for public purposes as authorized by general law, and unless approved by a majority of the qualified voters of the unit who vote thereon.

(4) *Certain debts barred.* No county, city or town, or other unit of local government shall assume or pay any debt or the interest thereon contracted directly or indirectly in aid or support of rebellion or insurrection against the United States.

(5) *Definitions.* A debt is incurred within the meaning of this Section when a county, city or town, special district, or other unit, authority, or agency of local government borrows money. A pledge of faith and credit within the meaning of this Section is a pledge of the taxing power. A loan of credit within the meaning of this Section occurs when a county, city or town, special district, or other unit, authority, or agency of local government exchanges its obligations with or in any way guarantees the debts of an individual, association, or private corporation.

(6) *Outstanding debt.* Except as provided in subsection (4), nothing in this Section shall be construed to invalidate or impair the obligation of any bond, note, or other evidence of indebtedness outstanding or authorized for issue as of July 1, 1973. (1969, c. 1200, s. 1.)

Legal Periodicials. — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

CASE NOTES

I. EDITOR'S NOTE.

Most of the cases cited in the following annotations were decided under this section as it stood before the revision of this Article by the amendment adopted Nov. 3, 1970, effective July 1, 1973.

II. PURPOSES; TWO-THIRDS LIMITATION.

This section contemplates a contracting of an obligation to be paid at some future time. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

It does not apply where the funds to be applied are already on hand and the proposed expenditure will impose no further liability on the municipality, nor involve the imposition of further taxation upon it. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

Effect of 1973 Amendment. — The 1973 amendment to this section is designed to

narrow the provision's restriction on the local government's contracting powers. The previously effective language was held to require submission to the voters of a wide variety of contract obligations. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

The 1973 amendment to this section specifically defined "debt" to mean the borrowing of money by the local government, thereby excluding most general contractual obligations from the requirement of submission to the voters. United States v. 30.60 Acres of Land, 535 F. Supp. 33 (E.D.N.C. 1981).

The acquisition of land from surplus funds is not beyond the power of a city and it in no way offends the provisions of this section. Davis v. Iredell County, 9 N.C. App. 381, 176 S.E.2d 361 (1970).

Provisions of Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act Held Unconstitutional. — Provisions of the Medical Care Commission (now Department of Human Resources) Hospital Facilities Finance Act (§ 131-138 et seq.), which authorize local governmental units to enter into lease agreements with the Medical Care Commission (now Department of Human Resources) and which make obligations of any such governmental unit under a lease agreement payable not only from revenues derived from the leased facility but also from revenues derived from other hospital facilities owned by the lessee and related to the leased facility, were held unconstitutional in that they authorize local government units to contract a debt without a vote of the people in excess of the amount specified in this section. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

Applied in In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

Sec. 5. Acts levying taxes to state objects.

Every act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose. (1969, c. 1200, s. 1.)

Legal Periodicals. — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

For a note on the rejection of the "public purpose" requirement for state tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under this section as it stood before the revision of this Article by amendment adopted Nov. 3, 1970, effective July 1, 1973.

A law authorizing a bond issue for various purposes which does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose is not void. Such matter may properly rest within the sound discretion of the municipal authorities. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Transfer of Funds from One Project to Another. — While a municipality has a limited authority, under certain conditions, to transfer or allocate funds from one project to another, included within the general purpose for which bonds are authorized, the transfer must be to a project included in the general purpose as stated in the bond resolution, and the funds may be diverted to the proposed purposes only in the event the municipality finds in good faith that conditions have so changed since the bonds were authorized that proceeds therefrom are no longer needed for the original purpose. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Courts Will Not Interfere with Exercise of Discretionary Powers of Municipal Corporation. — With respect to the use of bond money, the court will not interfere with the exercise of discretionary powers of a municipal corporation unless its actions are so unreasonable and arbitrary as to amount to an abuse of discretion. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Immaterial or Temporary Changes Not Unlawful Diversions of Funds. — While the law will not justify the use of the proceeds of a State or municipal bond issue for purposes other than those specified in the act authorizing the issue, it does not follow that immaterial or temporary changes consistent with the general purpose of the legislative act should be interpreted as unlawful diversions of public funds. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Changes Necessary to Accomplish General Purpose Are Not Outlawed. — It is worthy of note the cases on the use of bond money emphasize "deviation from the general purpose for which bonds are authorized" and do not outlaw such changes as are necessary under existing conditions to accomplish the general purpose. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

A definition of corporate purpose cannot be static. Changing conditions require that application of the limitations be tempered with due recognition of the existing situation so the purpose for which the public body was organized may be accomplished and enjoyment thereof by the public made possible. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Appropriation and Expenditure of State Tax Money for Elective Abortions Valid. — The funding of elective abortions constitutes a "necessary use and purpose of government" within the meaning of § 105-1, and the appropriation and expenditure of State tax moneys for elective abortions does not violate this section of the North Carolina Constitution. Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980), rev'd on other grounds, 302 N.C. 357, 275 S.E.2d 439 (1981).

A human fetus is not a "person" within the protection guaranteed by Art. I, §§ 1 and 19 of the Constitution of North Carolina, and State funding of elective abortions does not violate this section of the Constitution of North Carolina. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981).

Applied in In re Denial of Approval to Issue Hous. Bonds, 307 N.C. 52, 296 S.E.2d 281 (1982).

Cited in In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979).

Sec. 6. Inviolability of sinking funds and retirement funds.

(1) *Sinking funds.* The General Assembly shall not use or authorize to be used any part of the amount of any sinking fund for any purpose other than the retirement of the bonds for which the sinking fund has been created, except that these funds may be invested as authorized by law.

(2) *Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers' and State Employees' Retirement System or the Local Governmental Employees' Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers' and State Employees' Retirement System and the Local Governmental Employees' Retirement System shall not be applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee. (1969, c. 1200, s. 1.)

Legal Periodicals. — For note on taxation and revenue bonds to finance low-income housing, see 49 N.C.L. Rev. 830 (1971).

Sec. 7. Drawing public money.

(1) *State treasury.* No money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

(2) *Local treasury.* No money shall be drawn from the treasury of any county, city or town, or other unit of local government except by authority of law. (1969, c. 1200, s. 1.)

CASE NOTES

Receipt of Funds by General Assembly from State or Agencies. — The validity of any statute which provides that funds accruing to the State or any of its agencies "shall be received by the General Assembly" is questioned. Although the Constitution gives the

General Assembly broad power to raise revenue and make appropriations, nothing in the Constitution authorizes the legislative branch actually to receive funds. Advisory Opinion In re Separation of Powers, — N.C. —, 295 S.E.2d 589 (1982).

An order to make retroactive payments under the federal aid to dependent families program looks directly to the payment of public funds out of the State treasury in violation of this section. Dawkins v. Craig, 483 F.2d 1191 (4th Cir. 1973), cert. denied, 415 U.S. 938, 94 S. Ct. 1454, 39 L.Ed.2d 495 (1974).

Sec. 8. Health care facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State, counties, cities or towns, and other State and local governmental entities to issue revenue bonds to finance or refinance for any such governmental entity or any nonprofit private corporation, regardless of any church or religious relationship, the cost of acquiring, constructing, and financing health care facility projects to be operated to serve and benefit the public; provided, no cost incurred earlier than two years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from the revenues, gross or net, of any such projects and any other health care facilities of any such governmental entity or nonprofit private corporation pledged therefor; shall not be secured by a pledge of the full faith and credit, or deemed to create an indebtedness requiring voter approval of any governmental entity; and may be secured by an agreement which may provide for the conveyance of title of, with or without consideration, any such project or facilities to the governmental entity or nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto for nonprofit private corporations. (1975, c. 641, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Session Laws 1975, c. 641, s. 4, provides:

"Sec. 4. This act shall be deemed to provide an alternative method for the doing of the things authorized hereby, shall be regarded as supplemental and additional to powers conferred by other laws and shall not be regarded as in derogation of any powers now existing, and this act shall not be construed as a limitation or restriction on the power of the General Assembly to enact laws authorizing governmental entities to issue revenue bonds for health care purposes."

Defeated Amendment Proposal. — An amendment proposed by Session Laws 1973, c. 1222, and defeated at the general election held on Nov. 5, 1974, would have added a new § 8 to this Article, relating to bond issues to finance capital projects for industry.

Legal Periodicals. — For an article entitled, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

Sec. 9. Capital projects for industry.

Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to authorize counties to create authorities to issue revenue bonds to finance, but not to refinance, the cost of capital projects consisting of industrial, manufacturing and pollution control facilities for industry and pollution control facilities for public utilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project. (1975, c. 826, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the election held March 23, 1976.

Sec. 10. Joint ownership of generation and transmission facilities.

In addition to other powers conferred upon them by law, municipalities owning or operating facilities for the generation, transmission or distribution of electric power and energy and joint agencies formed by such municipalities for the purpose of owning or operating facilities for the generation and transmission of electric power and energy (each, respectively, "a unit of municipal government") may jointly or severally own, operate and maintain works, plants and facilities, within or without the State, for the generation and transmission of electric power and energy, or both, with any person, firm, association or corporation, public or private, engaged in the generation, transmission or distribution of electric power and energy for resale (each, respectively, "a co-owner") within this State or any state contiguous to this State, and may enter into and carry out agreements with respect to such jointly owned facilities. For the purpose of financing its share of the cost of any such jointly owned electric generation or transmission facilities, a unit of municipal government may issue its revenue bonds in the manner prescribed by the General Assembly, payable as to both principal and interest solely from and secured by a lien and charge on all or any part of the revenue derived, or to be derived, by such unit of municipal government from the ownership and operation of its electric facilities; provided, however, that no unit of municipal government shall be liable, either jointly or severally, for any acts, omissions or obligations of any co-owner, nor shall any money or property of any unit of municipal government be credited or otherwise applied to the account of any co-owner or be charged with any debt, lien or mortgage as a result of any debt or obligation of any co-owner. (1977, c. 528, s. 1.)

Editor's Note. — This section was added by constitutional amendment adopted by vote of the people at the general election held Nov. 8, 1977.

Proposed New § 11. — Session Laws 1983, c. 765, s. 1, proposes to add a new section to this Article to read as follows: "Capital projects for agriculture. Notwithstanding any other provision of the Constitution the General Assembly may enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds.

"In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

"The power of eminent domain shall not be exercised to provide any property for any such capital project."

Session Laws 1983, c. 765, s. 2 provides: "The Constitutional amendment set forth in Section 1 shall be submitted to the qualified voters of the State at the next State primary, general, or other statewide election for their ratification or rejection. At such election the State Board of Elections shall cause to be printed the following:

'☐ FOR Constitutional amendment to permit the General Assembly to enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds, such bonds to be secured by and payable only from revenues or property

derived from private parties and in no event to be secured by or payable from any public moneys whatsoever.

☐ AGAINST Constitutional amendment to permit the General Assembly to enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds, such bonds to be secured by and payable only from revenues or property derived from private parties and in no event to be secured by or payable from any public moneys whatsoever.'

"Those qualified voters favoring the amendment shall vote by making an 'X' or a check mark in the square beside the statement beginning 'FOR', and those qualified voters opposed to the amendment shall vote by making an 'X' or a check mark in the square beside the statement beginning 'AGAINST'.

"Notwithstanding the foregoing provisions of this section, voting machines may be used in accordance with rules and regulations prescribed by the State Board of Elections."

Session Laws 1983, c. 765, s. 3, provides: "If a majority of votes cast thereon are in favor of the amendment, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of his office, and the amendment shall become effective upon such certification."

Session Laws 1983, c. 765, s. 4, makes the act effective upon ratification. The act was ratified July 15, 1983.

Defeated Amendment Proposals. — An amendment proposed by Session Laws 1981, c. 808, s. 1, as amended by Session Laws 1981, c. 987, s. 1, and defeated at the election held June 29, 1982, would have added a new § 11 to this Article, relating to seaport and airport facilities.

An amendment proposed by Session Laws 1981, c. 887, s. 1, and defeated at the election held June 29, 1982, would have added a new § 11 to this Article, relating to higher education facilities.

An amendment proposed by Session Laws 1981 (Reg. Sess. 1982), c. 1247, s. 1, and defeated at the election held in 1982 would have added a new § 11 to this Article, relating to the definition of territorial areas in or near the central business district of a city or town and the borrowing of money to finance development projects therein.

ARTICLE VI

SUFFRAGE AND ELIGIBILITY TO OFFICE

Section 1. Who may vote.

Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided. (1971, c. 201, s. 1; c. 1141, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 7, 1972, substituted "18" for "21."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that the amendment shall be effective Jan. 1, 1973.

CASE NOTES

Eighteen-year olds are now sui juris and, if they possess the qualifications prescribed by law for all voters, are eligible to vote. Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

Sec. 2. Qualifications of voter.

Legal Periodicals. — For comment entitled, "State Durational Residence Requirements as a Violation of the Equal Protection Clause," see 3 N.C. Cent. L.J. 233 (1972).

For survey of 1972 case law on student suffrage, see 51 N.C.L. Rev. 1060 (1973).

CASE NOTES

"Residence" Defined. —
Residence within the purview of this provision is synonymous with domicile, and as used in the North Carolina Constitution of 1970 continues to mean domicile. Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972).

One-Year Residency Requirement Invalid As Applied to Local Elections. — The one-year durational residency requirement as it relates to the right to vote in local elections, is unconstitutional and invalid, as violative of the equal protection clause of the Fourteenth Amendment. Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971), aff'd, 405 U.S. 1034, 92 S. Ct. 1306, 31 L.Ed.2d 576 (1972).

Denial of Right to Vote to Convicted Felon Is Not Cruel and Unusual Punishment. — Plaintiff's argument that denial of right to vote for being a convicted felon is cruel and unusual punishment is without merit, especially considering the large number of states that do so. Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), aff'd, 411 U.S. 961, 93 S. Ct. 2151, 36 L.Ed.2d 681 (1973).

United States Const., Amend. XIV, § 2, Expressly Allows Exclusion of Felons. — A state may constitutionally continue the "historic exclusion" of felons from the franchise without regard to whether such exclusion can pass muster under the equal protection clause, because U.S. Const., amend. XIV, § 2, expressly allows the exclusion of felons from the franchise without reduction of representation. Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), aff'd, 411 U.S. 961, 93 S. Ct. 2151, 36 L.Ed.2d 681 (1973).

Provisions in State statutes and constitutions which deny convicted felons the right to vote and hold office do not violate the various rights guaranteed by the Constitution of the United States. Wilson v. Goodwyn, 522 F. Supp. 1214 (E.D.N.C. 1981).

Sec. 6. Eligibility to elective office.

Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office. (1971, c. 201, s. 1; c. 1141, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 7, 1972, inserted "who is 21 years of age."

Session Laws 1971, c. 201, s. 4, as amended by Session Laws 1971, c. 1141, s. 1, provides that the amendment shall be effective Jan. 1, 1973.

OPINIONS OF ATTORNEY GENERAL

Qualifications Are for "Elective Office"; a Sheriff's Deputy Need Not Reside in the County in Which He Serves. — See opinion of Attorney General to Sheriff John H. Stockard, 41 N.C.A.G. 754 (1972).

Sec. 8. Disqualifications for office.

CASE NOTES

"Adjudged" Defined. — The word "adjudged" means "to decide or rule upon as a judge or with judicial or quasi-judicial powers." In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

"Guilty" Defined. — The word "guilty" connotes evil, intentional wrongdoing and refers to conscious and culpable acts; it does not necessarily mean or require criminal conviction or the finding of a jury. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The definitions of "adjudged" and "guilty" are broad enough to encompass an adjudication by the Supreme Court, pursuant to the provisions of § 7A-376, that a judge is guilty of willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Criminal Conviction Unnecessary for

Disqualification. — The substitution in this section of the term "adjudged guilty" for the term "convicted" permits the General Assembly to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office. Pursuant to that authorization, the legislature enacted § 7A-376, barring a judge from future judicial office when he has been removed by this court for willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Adjudication of "Willful Misconduct in Office" Equivalent of "Malpractice in Any Office" for Removal Purposes. — An adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in this section. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under § 7A-376. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Cited in Brooks v. Edwards, 396 F. Supp. 662 (W.D.N.C. 1974).

OPINIONS OF ATTORNEY GENERAL

Requirement that Applicant for Office Admit Existence of God Violates First Amendment of United States Constitution. — See opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, 41 N.C.A.G. 727 (1972).

Sec. 9. Dual office holding.

Cross References. — As to school committeemen and advisory council members, see § 115C-54.

CASE NOTES

Cited in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977).

ARTICLE VII

LOCAL GOVERNMENT

Section 1. General Assembly to provide for local government.

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within one mile of the corporate limits of any other city or town having a population of 5,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within three miles of the corporate limits of any other city or town having a population of 10,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within four miles of the corporate limits of any other city or town having

a population of 25,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within five miles of the corporate limits of any other city or town having a population of 50,000 or more according to the most recent decennial census of population taken by order of Congress. Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house. (1971, c. 857, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 7, 1972, added the second paragraph.

Session Laws 1971, c. 857, s. 4, provides that the amendment shall be effective Jan. 1, 1973.

Legal Periodicals. — For note on the expansion of standing in North Carolina taxpayers' actions, see 15 Wake Forest L. Rev. 126 (1979).

CASE NOTES

The fixing of boundaries of municipal corporations is a permissible legislative function. Jones v. Jeanette, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

Court Inquiry into Motives of Legislature. — Ordinarily, the courts have no authority to inquire into the motives of the legislature in the incorporation of political subdivisions. Jones v. Jeanette, 34 N.C. App. 526, 239 S.E.2d 293 (1977).

A municipal corporation, city or town, is an agency created by the State to assist in the civil government of a designated territory. Its charter is the legislative description of the power to be exercised. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Counties, cities and towns, etc. —

The counties of North Carolina were created by the General Assembly as governmental agencies of the State. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

A county derives its power to tax from the legislature and cannot complain that the enabling legislation is lacking in breadth. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

The power of taxation must be exercised by the legislative branch. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

The charter of a municipal corporation, city or town, is the legislative description of the power to be exercised. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Powers of Municipal Corporation. — A municipal corporation possesses, and can exercise, the following powers, and no others: (1) those granted in express words; (2) those necessarily or fairly implied; and (3) those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

Doubt as to Power Resolved against Corporation. — Any fair, reasonable doubt concerning the existence of power is resolved by the courts against a municipal corporation, and the power is denied. In re Incorporation of Indian Hills, 280 N.C. 659, 186 S.E.2d 909 (1972).

County Has No Inherent Power to Levy Taxes. — A sovereign state, as one of its inherent attributes, has the power of taxation, which must be exercised by its legislative branch. The county is not a sovereign and hence does not have the inherent power to levy taxes. A county must derive its taxing power from the State Constitution or from the State's legislative enactments. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

The counties have no inherent taxing power. In re Appeal of Martin, 286 N.C. 66, 209 S.E.2d 766 (1974).

A county board of elections does not have taxing power. Hajoca Corp. v. Clayton, 277 N.C. 560, 178 S.E.2d 481 (1971).

Annexation within Legislature's Power. — Annexation by a municipal corporation is a political question which is within the power of the State legislature to regulate. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

The enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction, the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the legislature. With its wisdom, propriety or justice have naught to do. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

But Power Not Unlimited. — The power of the legislature to expand the boundaries of cities, towns, or other local units, though great, is not unlimited. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

Review of Local Annexation Act. — A local annexation act is not insulated from judicial review when it is an instrument for circumventing a constitutionally protected right. Abbott v. Town of Highlands, 52 N.C. App. 69, 277 S.E.2d 820, appeal dismissed and cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981).

Notice of Annexation. — Notice by publication of a public hearing pursuant to § 160A-24 does not provide inadequate notice to the parties affected by the annexation in violation of their right to due process, since the General Assembly, under this section, of the North Carolina Constitution, may annex land without notice to anyone. Texfi Indus., Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979), aff'd, 301 N.C. 1, 269 S.E.2d 142 (1980).

Cited in State v. Jones, 41 N.C. App. 189, 25 S.E.2d 234 (1979).

ARTICLE VIII

CORPORATIONS

Section 1. Corporate charters.

CASE NOTES

Quoted in Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974).

ARTICLE IX

EDUCATION

Section 1. Education encouraged.

Legal Periodicals. — For a comment, "The State and Sectarian Education: Regulation to Deregulation," see 1980 Duke L.J. 801.

CASE NOTES

Quoted in Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970); Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

Cited in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

Sec. 2. Uniform system of schools.

Cross References. — As to establishment of uniform school system, see § 115C-1.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

For survey of 1981 constitutional law, see 60 N.C.L. Rev. 1272 (1982).

CASE NOTES

In General. —

The provisions of this section and N.C. Const., Art. I, § 15, with the activating statutes, embody mandates for the establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and "the duty of the State to maintain and guard that right," while guaranteeing equal opportunities to all students. Webster v. Perry, 512 F.2d 612 (4th Cir. 1975).

Equal access to participation in the public school system is a fundamental right, guaranteed by the State Constitution and protected by considerations of procedural due process. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

The General Assembly has not delegated to boards of county commissioners the power to initiate and fund their own programs for the public schools; rather, county commissioners are delegated the power to fund only those school-related programs proposed by the board of education. Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979).

Constitution Does Not Prohibit Charging Financially Able Persons For Supplies and Materials. — That the administrative boards of certain school districts require those pupils or their parents who are financially able to do so to furnish supplies and materials for the personal use of such students does not violate the mandate of subsection (1) of this section. Nor is there any constitutional impediment to the charging of modest, reasonable fees by individual school boards to support the purchase of supplementary supplies and materials for use by or on behalf of students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

Fee waiver policy adopted by city board of education was unconstitutional where it failed to establish a mechanism by which the schools would affirmatively notify students and their parents of the availability of a waiver or reduction of the fee or by which the students or parents themselves might apply for a partial or complete exemption from the fee requirements, since the waiver policy did not fairly guarantee to low income and indigent students their right of equal access to the educational opportunities available at their schools and did not accord procedural due process to such students. Sneed v. Greensboro City Bd. of Educ., 299 N.C. 609, 264 S.E.2d 106 (1980).

Day-Care Program in Elementary School. — A local school board permitting a day-care program for "latch key" children to be operated in an elementary school is not in violation of this section. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

The legislature may constitutionally delegate to the school board the power or authority to maintain a day-care program. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

Tuition paid by students enrolled in day-care program is not violative of this section where the tuition is for a supplemental program, not for the students' basic education. Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981), appeal dismissed and cert. denied, 305 N.C. 300, 291 S.E.2d 150 (1982).

Charlotte-Mecklenburg Schools Ordered to Desegregate. — See Swann v. Charlotte-Mecklenburg Bd. of Educ., 318 F. Supp. 786 (W.D.N.C. 1970).

Students Expelled under former § 115-147 Entitled to Reinstatement or Equivalent. — Under the North Carolina Constitution and the implementing statute, students expelled from school pursuant to the authority of former § 115-147 might be entitled to either reinstatement or to equivalent free educational opportunities in a more suitable environment. Webster v. Perry, 367 F. Supp. 666 (M.D.N.C. 1973), modified on other grounds, 512 F.2d 612 (4th Cir. 1975).

Quoted in Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972); Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs, 26 N.C. App. 114, 215 S.E.2d 412 (1975).

Sec. 3. School attendance.

Legal Periodicals. — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

CASE NOTES

Right to Education. — The Constitution of North Carolina treats education as the right of every child of "sufficient physical and mental ability." Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 4. State Board of Education.

Cross References. — For statutory provisions concerning function of Superintendent of Public Instruction, see § 115C-19.

Legal Periodicals. — For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

CASE NOTES

Stated in Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971).

Cited in Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

Sec. 5. Powers and duties of Board.

Legal Periodicals. — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

CASE NOTES

Constitution of 1868 Authorized Rules on Certification of Teachers. — Article IX, § 9, Const. 1868, was designed to make, and did make, the powers conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly. That Constitution, itself, conferred upon the State Board of Education the enumerated powers to regulate the salaries and qualifications of teachers and to make needful rules and regulations in relation to this and other aspects of the administration of the public school system. In the silence of the General Assembly, the authority of the State Board to promulgate and administer further regulations concerning the certification of teachers in the public schools was limited only by other provisions in the Constitution itself. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

And Present Constitution Contains Similar Authorization. — Rules and regulations relating to the certification of teachers being needed for the effective supervision and administration of the public school system, there is no difference in substance between the powers of the State Board of Education authorizing regulations on this matter under Art. IX, § 9, Const. 1868, and this section. Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), cert. denied, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972).

Quoted in Givens v. Poe, 346 F. Supp. 202 (W.D.N.C. 1972).

Sec. 7. County school fund.

CASE NOTES

This section was designed in its entirety, etc. —

In accord with original. See Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Where fines and penalties are prescribed as a punishment for a violation of public wrongs, i.e., crimes, and such penalties or fines are to be recovered by public authority, the dis-

position of such recovered fines or penalties comes within the constitutional provision under consideration, and they may not be turned away from the prescribed constitutional course. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Any statute purporting to give what are in reality fines either to an individual or to another governmental agency violates this constitutional provision. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Judgment by a trial judge which seeks to direct payment of a fine anywhere other than to the counties for the use of the public schools is unconstitutional. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Moneys to be set aside for future enforcement of the law cannot be deducted from "fines" to arrive at "clear proceeds" of fines. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Provision in separation agreement that plaintiff pay educational expenses for children is not violative of this section nor of the Fourteenth Amendment to the United States Constitution where such expenses are incurred in attendance at private school. Carpenter v. Carpenter, 25 N.C. App. 235, 212 S.E.2d 911, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975).

Moneys Voluntarily Paid for Violations of City Ordinances Belong to County School Fund. — Moneys voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine collected for breach of a state penal law and should be used exclusively for maintaining free public schools in the county pursuant to this section, since violation of a city ordinance is also a violation of § 14-4 which makes the violation of a local ordinance a misdemeanor. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Effect of City's Civil Action to Recover Penalties. — In any case in which a person is prosecuted, convicted, and a fine imposed for the violation of a parking ordinance, the fine so imposed must be paid, by directive of this section, to the county school fund. However, if a city chooses to maintain civil actions to recover the penalties imposed for parking violations, the proceeds of any judgment obtained would belong to the city, and the school fund would have no claim thereon. Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8, aff'd in part and rev'd in part, 301 N.C. 340, 271 S.E.2d 258 (1980).

Section 15A-544(h) permitting the remission of the amounts adjudged forfeited on criminal appearance bonds does not violate the constitutional provision that the proceeds of forfeitures are to remain in the several counties and be used in the public schools. State v. Locklear, 42 N.C. App. 486, 256 S.E.2d 830, appeal dismissed, 298 N.C. 302, 259 S.E.2d 303 (1979).

Applied in State v. Walker, 27 N.C. App. 295, 219 S.E.2d 76 (1975).

Stated in Wilson County Bd. of Educ. v. Wilson County Bd. of Comm'rs, 26 N.C. App. 114, 215 S.E.2d 412 (1975).

Cited in Roberson v. Dale, 464 F. Supp. 680 (M.D.N.C. 1979); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

Sec. 9. Benefits of public institutions of higher education.

Legal Periodicals. — For comment on state regulation of private religious schools, see 16 Wake Forest L. Rev. 405 (1980).

ARTICLE X

HOMESTEADS AND EXEMPTIONS

Section 1. Personal property exemptions.

Legal Periodicals. — For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

For an article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Law Protects Owner Only from Loss of Exempt Property under Final Process. — The law protects the owner not from destitution but only from loss of exempt property due to sale under final process for the collection of any debt. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor May Voluntarily Bargain away Right. — In the cases of foreclosure of mortgages or of taking possession of collateral after default, no right to possession of property otherwise exempt remains in the debtor who has voluntarily bargained it away. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

The exemption provisions in the Constitution do not make special allowances for a resident's sole remaining assets. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Legislature Has Not Prevented Debtor from Transferring Interest in Property to Another. — The legislature has seen fit to surround the family home with certain protection against the demands of urgent creditors to put it beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. It has not seen fit to prevent a debtor from "selling" or otherwise transferring an interest in that property to another, thereby giving the other priority of right to possession of the collateral. The constitutional exemption operates against general creditors so as to allow the debtor to retain his most valued $500.00 of property in the face of their executions. It does not operate so as to hinder secured creditors from realizing on the terms of their bargain. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Security Interest Replaced Chattel Mortgage as Protection of Creditor. — Before the enactment of the Uniform Commercial Code, a debtor could subject his personal property to a chattel mortgage, and if he did so, the property was liable for the mortgage debt first and the debtor's exemption was allotted only in the amount of the surplus. An Article 9 security interest by the terms of the Uniform Commercial Code replaces the chattel mortgage as a method of protecting the creditor. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Debtor divested herself of her right to possession of personal property which might otherwise have been exempt by the terms of her consumer loan contract with her creditor whereby the creditor obtained a security interest in all of her personal property, including her household furnishings. When the debtor defaulted, the creditor had an immediate right to possess all articles in which she had given a security interest. However, this right must be distinguished from any interest which a creditor might seek under an executory waiver of the right to exemption. It has long been held that a debtor cannot be bound by any agreement to waive his exemption in case of levy upon his property. Montford v. Grohman, 36 N.C. App. 733, 245 S.E.2d 219, appeal dismissed, 295 N.C. 551, 248 S.E.2d 727 (1978).

Sec. 2. Homestead exemptions.

(3) *Exemption for benefit of surviving spouse.* If the owner of a homestead dies, leaving a surviving spouse but no minor children, the homestead shall be exempt from the debts of the owner, and the rents and profits thereof shall inure to the benefit of the surviving spouse until he or she remarries, unless the surviving spouse is the owner of a separate homestead.

(4) *Conveyance of homestead.* Nothing contained in this Article shall operate to prevent the owner of a homestead from disposing of it by deed, but no deed made by a married owner of a homestead shall be valid without the signature and acknowledgement of his or her spouse. (1977, c. 80, ss. 1, 2.)

Only Part of Section Set Out. — As subsections (1) and (2) were not changed by the amendment, they are not set out.

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 8, 1977, rewrote subsections (3) and (4) so as to make them applicable to a surviving spouse rather than to a widow only. The amendment also inserted "minor" preceding "children" in subsection (3).

Legal Periodicals. — For note on the non-purchase security agreement as a relinquishment of the personal property exemption, see 15 Wake Forest L. Rev. 708 (1979).

For an article on debtors' exemption rights under the Bankruptcy Reform Act, see 58 N.C. L. Rev. 769 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

CASE NOTES

I. EXEMPTION GENERALLY.

Present Possessory Interest Necessary for Homestead Exemption Claim. — In this State, a homestead exemption may not be claimed in property in which the claimant has no present possessory interest at the time the claim is made. In re Hudson, 4 Bankr. 337 (Bankr. E.D.N.C. 1980).

The right to claim homestead, etc.

Where defendants made no objection to the sale of real property under execution without allotting the homestead until five months after the sale was completed, where the real property was sold to third parties in the meantime, and where the feme defendant was present at the sale and did not request the allotment of a homestead, these facts constituted a waiver by the defendants of their right to have the homestead allotted. North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980), appeal dismissed, 302 N.C. 217, 276 S.E.2d 916 (1981).

Comparison of former section with the present subsection (1) reveals that the major difference is that under the former the homestead could not exceed $1000 in value, while under the present Constitution the homestead shall be to a value fixed by the General Assembly but not less than $1000. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

Power to Increase Value of Homestead Exemption. — The Constitution expressly vests in the General Assembly, not in the courts, the exclusive power to increase the value of the homestead exemption. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

Exemption of Dwelling House Regardless of Value. — The constitutional and statutory enactments relating to the homestead exemption cannot be so construed as to permit exemption of an entire usable dwelling house, regardless of its value. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

Where Allotment Useless to Debtor and Impairs Value of Remaining Property. — Where the debtor requested that the allotment of his homestead begin at a point at the front door of his dwelling, with the result that the entire area allotted was located in the hallway adjacent to the front door of the house, the fact that the allotment was useless to the debtor and impaired the value of the remaining property available for satisfaction of the creditor's judgment did not entitle the debtor to claim his exemption in the entire dwelling. Seeman Printery, Inc. v. Schinhan, 34 N.C. App. 637, 239 S.E.2d 744 (1977), appeal dismissed, 294 N.C. 442, 241 S.E.2d 844 (1978).

Sec. 3. Mechanics' and laborers' liens.

CASE NOTES

Quoted in Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692 (1976).

Cited in Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Sec. 4. Property of married women secured to them.

Legal Periodicals. — For comment on the constitutionality of the privy examination under § 52-6(a) (now repealed) and its relation to this section, see 12 Wake Forest L. Rev. 1007 (1977).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

For comment discussing the status of the presumption of purchase money resulting trust for wives in light of Mims v. Mims, 305 N.C. 41,

286 S.E.2d 779 (1982), see 61 N.C.L. Rev. 576 (1983).

For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

For comment on the tax effects of equitable distribution upon divorce, see 18 Wake Forest L. Rev. 555 (1982).

CASE NOTES

Cited in Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Murphy v. Davis, — N.C. App. —, 300 S.E.2d 871 (1983).

Sec. 5. Insurance.

A person may insure his or her own life for the sole use and benefit of his or her spouse or children or both, and upon his or her death the proceeds from the insurance shall be paid to or for the benefit of the spouse or children or both, or to a guardian, free from all claims of the representatives or creditors of the insured or his or her estate. Any insurance policy which insures the life of a person for the sole use and benefit of that person's spouse or children or both shall not be subject to the claims of creditors of the insured during his or her lifetime, whether or not the policy reserves to the insured during his or her lifetime any or all rights provided for by the policy and whether or not the policy proceeds are payable to the estate of the insured in the event the beneficiary or beneficiaries predecease the insured. (1977, c. 115, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 8, 1977, rewrote this section so as to make it applicable to insurance upon the life of a person of either sex, rather than of a husband only.

Legal Periodicals. — For an article on debtors' exemption rights under the Bankruptcy Reform Act, see 58 N.C.L. Rev. 769 (1980).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interests of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

Applied in First Nat'l Bank v. Dixon, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

ARTICLE XI

PUNISHMENTS, CORRECTIONS, AND CHARITIES

Section 1. Punishments.

Legal Periodicals. —

For article, "Sentencing Due Process: Evolving Constitutional Principles," see 18 Wake Forest L. Rev. 523 (1982).

CASE NOTES

Limits Remedial Creativity. — This provision, in effect since 1868, was intended to stop the use of degrading punishments theretofore inflicted, but as a necessary consequence it also limited the creativity of trial judges in fashioning remedies for crime. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

As a consequence of the desire for more diverse responses to criminal behavior, the practice developed to suspend a constitutionally designated punishment with the consent of the defendant upon his performance of conditions. And so long as these conditions are otherwise constitutional, related to the purposes of punishment, and otherwise reasonable they need not be limited to the type of punishment prescribed by this provision. Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976).

Right and Duty of Prosecuting Attorney to Seek Death Penalty. — The grand jury, an agency of the State, after investigation according to law, indicted the defendant for murder in the first degree, and the solicitor, an officer of the State, after investigation, determined, on behalf of the State, that the defendant should be tried for this offense and that the death penalty should be sought. These determinations having been made on behalf of the State, it was the right and duty of the prosecuting attorney, vigorously, but fairly and in accordance with law, both in the presentation of evidence and in his argument, to seek that result. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Cited in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Sec. 2. Death punishment.

CASE NOTES

Applied in State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

Cited in State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974).

Sec. 4. Welfare policy; board of public welfare.

CASE NOTES

Quoted in Vaughn v. Durham County Dep't of Social Servs., 34 N.C. App. 416, 240 S.E.2d 456 (1977).

Cited in Casey v. Wake County, 45 N.C. App. 522, 263 S.E.2d 360 (1980).

ARTICLE XIII

CONVENTIONS; CONSTITUTIONAL AMENDMENT AND REVISION

Sec. 2. Power to revise or amend Constitution reserved to people.

Legal Periodicals. — For a note on the rejection of the "public purpose" requirement for State tax exemption, see 17 Wake Forest L. Rev. 293 (1981).

ARTICLE XIV

MISCELLANEOUS

Sec. 3. General laws defined.

Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act. (1969, c. 1200, s. 1.)

Effect of Amendments. — The amendment adopted by vote of the people at the general election held Nov. 3, 1970, effective July 1, 1973, inserted "or general laws uniformly applicable throughout the State" in the first sentence, substituted "such" for "that" preceding "subject matter" near the end of the first sentence, added the third sentence and deleted "county, city and town, and other" preceding "unit of local government" near the end of the fourth sentence.

CASE NOTES

The constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Is a General Law. — A general law defines a class which reasonably warrants special legislative attention and applies uniformly to everyone in the class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

A law is general if any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

What Is a Local Act. — A local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Distinguishing between General and Local Acts. — The distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Classification does not render a statute "local" if the classification is reasonable and based on rational difference of situation and condition. Adams v. North Carolina Dep't

of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Regulation Need Not Reach Every Conceivable Class. — There is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied — that the legislature must be held rigidly to the choice of regulating all or none. It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

While substantial distinctions are essential in classification, the distinctions need not be scientific or exact. The legislature has wide discretion in making classifications. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Coastal Area Management Act Valid. — The Coastal Area Management Act of 1974 is a general law which the General Assembly had power to enact. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Applied in Chem-Security Systems v. Morrow, — N.C. App. —, 300 S.E.2d 393 (1983).

Sec. 5. Conservation of natural resources.

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by resolution adopted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes. (1971, c. 630, s. 1.)

Editor's Note. — This section was added by the constitutional amendment adopted by vote of the people at the general election held Nov. 7, 1972.

Session Laws 1971, c. 630, s. 4, provides that the section shall be effective July 1, 1973.

Constitution of the United States

AMENDMENTS

Amendment XXVI.

§ 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

§ 2. The Congress shall have power to enforce this article by appropriate legislation.

Editor's Note. — The Twenty-sixth Amendment was certified by the Administrator of General Services on July 5, 1971, to have been ratified by three-fourths of the whole number of states and to have become valid as a part of the Constitution of the United States.

Appendix I. Rules of Practice in the General Court of Justice

(1) RULES OF PRACTICE IN THE SUPREME COURT OF NORTH CAROLINA

(Superseded as of July 1, 1975.)

Editor's Note. — These rules are superseded by the North Carolina Rules of Appellate Procedure, adopted by the Supreme Court June 13, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix I (2A).

(2) SUPPLEMENTARY RULES

Governing the Hearing of Causes in the Supreme Court Which Were Originally Docketed in the Court of Appeals and Other Rules Required by the Act Establishing the Court of Appeals.

(Superseded as of July 1, 1975.)

Editor's Note. — These rules are superseded by the North Carolina Rules of Appellate Procedure, adopted by the Supreme Court June 13, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix I (2A).

(2A) NORTH CAROLINA RULES OF APPELLATE PROCEDURE

(Adopted June 13, 1975.)

These rules are promulgated by the Court under the rule-making authority conferred by Article IV, § 13(2) of the Constitution of North Carolina. They shall be effective with respect to all appeals taken from orders and judgments of the Superior Courts, the District Courts, the North Carolina Industrial Commission, the North Carolina Utilities Commission and the Commissioner of Insurance of North Carolina in which notice of appeal was given on and after July 1, 1975. As to such appeals, these rules supersede the Rules of Practice in the Supreme Court of North Carolina, 254 N.C. 783 (1961), as amended; the Supplementary Rules of the Supreme Court, 271 N.C. 744 (1967), as amended; and the Rules of Practice in the Court of Appeals of North Carolina, 1 N.C. App. 632 (1968), as amended. With respect to all appeals in which notice of appeal was given prior to July 1, 1975, the rules of court and statutes then controlling appellate procedure are continued in force as the Rules of Practice of the Courts of the Appellate Division until final disposition of the appeals.

The Drafting Committee Notes and an Appendix of Tables and Forms prepared by the Committee are published with the rules for their possible helpfulness to the profession in the early stages of experience with these rules. Although authorized to be published for this purpose, they are not authoritative sources on parity with the rules.

Article I. Applicability of Rules

Rule
1. Scope of Rules: Trial Tribunal Defined.
   (a) Scope of Rules.
   (b) Rules Do Not Affect Jurisdiction.
   (c) Definition of Trial Tribunal.
2. Suspension of Rules.

Article II. Appeals from Judgments and Orders of Superior Courts and District Courts

3. Appeal in Civil Cases — How and When Taken.
   (a) From Judgments and Orders Rendered in Session.
   (b) From Judgments and Orders Rendered Out of Session.
   (c) Time When Taken by Written Notice.
   (d) Content of Notice of Appeal.
   (e) Service of Notice of Appeal.
4. Appeal in Criminal Cases—How and When Taken.
   (a) Manner and Time.
   (b) Content of Notice of Appeal.
   (c) Service of Notice of Appeal.
   (d) To which Appellate Court Addressed.
5. Joinder of Parties on Appeal.
   (a) Appellants.
   (b) Appellees.
   (c) Procedure after Joinder.
6. Security for Costs on Appeal in Civil Actions.
   (a) In Regular Course.
   (b) In Forma Pauperis Appeals.
   (c) Filed with Record on Appeal.
   (d) Dismissal for Failure to File or Defect in Security.
7. [Reserved.]
8. Stay Pending Appeal in Civil Actions.
9. The Record on Appeal—Function, Composition, and Form.
   (a) Function.
   (b) Composition.
      (1) In Civil Actions and Special Proceedings.
      (2) In Appeals from Superior Court Review of Administrative Boards and Agencies.
      (3) In Criminal Actions.
      (4) Order of Arrangement.
      (5) Inclusion of Unnecessary Matter: Penalty.
      (6) Additions and Amendments to Record on Appeal.
   (c) Form — General Provisions.
      (1) Evidence—How Set Out.
      (2) Exhibits.
      (3) Filing Dates and Signatures on Papers.
      (4) Pagination; Counsel Identified.
10. Exceptions and Assignments of Error in Record on Appeal.
   (a) Function in Limiting Scope of Review.
   (b) Exceptions.
      (1) General.
      (2) Jury Instructions; Findings and Conclusions of Judge.
      (3) Sufficiency of the Evidence.

Rule
(c) Assignments of Error—Form.
(d) Exceptions and Cross Assignments of Error by Appellee.
11. Settling the Record on Appeal; Certification.
(a) By Agreement.
(b) By Appellee's Approval of Appellant's Proposed Record on Appeal.
(c) By Judicial Order or Appellant's Failure to Request Judicial Settlement.
(d) Multiple Appellants; Single Record on Appeal.
(e) Certification of Record on Appeal.
(f) Extensions of Time.
12. Filing the Record: Docketing the Appeal: Copies of Record.
(a) Time for Filing Record on Appeal.
(b) Docketing the Appeal.
(c) Copies of Record on Appeal.
13. Filing and Service of Briefs.
(a) Time for Filing and Service.
(b) Copies Reproduced by Clerk.
(c) Consequence of Failure to File and Serve Briefs.

Article III. Review by Supreme Court of Appeals Originally Docketed in Court of Appeals: Appeals of Right; Discretionary Review

14. Appeals of Right from Court of Appeals to Supreme Court Under G.S. 7A-30.
(a) Notice of Appeal; Filing and Service.
(b) Same; Content.
(1) Appeal Not Presenting Constitutional Question.
(2) Appeal Presenting Constitutional Question.
(c) Record on Appeal.
(1) Composition.
(2) Transmission; Docketing; Copies.
(d) Briefs.
(1) Filing and Service; Copies.
(2) Failure to File or Serve.
15. Discretionary Review on Certification by Supreme Court Under G.S. 7A-31.
(a) Petition of Party.
(b) Same; Filing and Service.
(c) Same; Content.
(d) Response.
(e) Certification by Supreme Court; How Determined and Ordered.
(1) On Petition of a Party.
(2) On Initiative of the Court.
(3) Orders: Filing and Service.
(f) Record on Appeal.
(1) Composition.
(2) Filing; Copies.
(g) Filing and Service of Briefs.
(1) Cases Certified Before Determination by Court of Appeals.
(2) Cases Certified for Review of Court of Appeals Determinations.
Rule
(3) Copies.
(4) Failure to File or Serve.
(h) Discretionary Review of Interlocutory Orders.
(i) Appellant, Appellee Defined.
16. Scope of Review of Decisions of Court of Appeals.
(a) How Determined.
(b) Appellant, Appellee Defined.
17. Appeal Bond in Appeals Under G.S. 7A-30, 7A-31.
(a) Appeal of Right.
(b) Discretionary Review of Court of Appeals Determination.
(c) Discretionary Review by Supreme Court Before Court of Appeals Determination.
(d) Appeals in Forma Pauperis.

Article IV. Direct Appeals from Administrative Agencies to the Court of Appeals

18. Taking Appeal; Record on Appeal— Composition and Settlement.
(a) General.
(b) Time and Method for Taking Appeals.
(c) Composition of Record on Appeal.
(d) Settling the Record on Appeal.
(1) By Agreement.
(2) By Appellee's Approval of Appellant's Proposed Record on Appeal.
(3) By Conference, Referee, or Agency Head; Failure to Request Settlement.
(e) Certification of Record on Appeal.
(f) Further Procedures.
19. Parties to Appeal from Agencies.
(a) From Utilities Commission.
(b) From Industrial Commission.
(c) From Commissioner of Insurance.
(d) From the Disciplinary Hearing Commission of the North Carolina State Bar.
20. Miscellaneous Provisions of Law Governing in Agency Appeals.

Article V. Extraordinary Writs

21. Certiorari.
(a) Scope of the Writ.
(b) Petition for Writ; to Which Appellate Court Addressed.
(c) Same; Filing and Service; Content.
(d) Response; Determination by Court.
(e) Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.
22. Mandamus and Prohibition.
(a) Petition for Writ; to Which Appellate Court Addressed.
(b) Same; Filing and Service; Content.
(c) Response; Determination by Court.
23. Supersedeas.

Rule
(a) Pending Review of Trial Tribunal Judgments and Orders.
(1) Application—When Appropriate.
(2) Same—How and to Which Appellate Court Made.
(b) Pending Review by Supreme Court of Court of Appeals Decisions.
(c) Petition: Filing and Service; Content.
(d) Response; Determination by Court.
(e) Temporary Stay.
24. Form of Papers: Copies.

Article VI. General Provisions

25. Dismissal for Failure to Comply with Rules.
26. Filing and Service.
(a) Filing.
(b) Service of All Papers Required.
(c) Manner of Service.
(d) Proof of Service.
(e) Joint Appellants and Appellees.
(f) Numerous Parties to Appeal Proceeding Separately.
(g) Form of Papers; Copies.
27. Computation and Extension of Time.
(a) Computation of Time.
(b) Additional Time After Service by Mail.
(c) Extensions of Time; by Which Court Granted.
28. Briefs; Function and Content.
(a) Function.
(b) Content of Appellant's Brief.
(c) Content of Appellee's Brief; Presentation of Additional Questions.
(d) [Repealed.]
(e) References in Briefs to the Record.
(f) Joinder of Multiple Parties in Briefs.
(g) Additional Authorities.
(h) Reply Briefs.
(i) Amicus Curiae Briefs.
29. Sessions of Courts; Calendar for Hearings.
(a) Sessions of Court.
(1) Supreme Court.
(2) Court of Appeals.
(b) Calendaring of Cases for Hearing.
30. Oral Argument.
(a) Order and Content of Argument.
(b) Time Allowed for Argument.
(1) In General.
(2) Numerous Counsel.
(c) Non-Appearance of Parties.
(d) Submission on Written Briefs.
(e) Decision of Appeal Without Publication of an Opinion.
(f) Pre-Argument Review; Decision of Appeal Without Oral Argument.
31. Petition for Rehearing.
(a) Time for Filing: Content.
(b) How Addressed; Filed.
(c) How Determined.
(d) Procedure When Granted.
(e) Stay of Execution.
(f) Waiver by Appeal from Court of Appeals.
(g) No Petition in Criminal Cases.
32. Mandates of the Courts.
(a) In General.
(b) Time of Issuance.
33. Attorneys.
(a) Appearances.
(b) Agreements.
34. Frivolous Appeals: Costs.
35. Costs.
(a) To Whom Allowed.
(b) Direction as to Costs in Mandate.
(c) Costs of Appeal Taxable in Trial Tribunals.
(d) Execution to Collect Costs in Appellate Courts.
36. Trial Judges Authorized to Enter Orders Under These Rules.
(a) When Particular Judge Not Specified by Rule.
(b) Upon Death, Incapacity, or Absence of Particular Judge Authorized.
37. Motions in Appellate Courts.
(a) Time; Content of Motions; Response.
(b) Determination.
38. Substitution of Parties.
(a) Death of a Party.
(b) Substitution for Other Causes.
(c) Public Officers; Death or Separation from Office.
39. Duties of Clerks; When Offices Open.
(a) General Provisions.
(b) Clerk's Docket Book, Judgment Docket and Minute Book.
40. Consolidation of Actions on Appeal.
41. Title.

ARTICLE I. APPLICABILITY OF RULES

Rule 1

Scope of Rules: Trial Tribunal Defined

(a) **Scope of Rules.** These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; in appeals in civil and criminal cases from the Court of Appeals to the Supreme Court; in direct appeals from administrative agencies to the Court of Appeals; and in applications to the courts of the appellate division for writs and other relief which the courts or judges thereof are empowered to give.

(b) **Rules Do Not Affect Jurisdiction.** These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.

(c) **Definition of Trial Tribunal.** As used in these rules, the term *trial tribunal* includes the superior courts, the district courts, the North Carolina Utilities Commission, the North Carolina Industrial Commission, and the Commissioner of Insurance.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary.

Subdivision (a) charts the coverage of this unitary set of Rules of Appellate Procedure as promulgated by the Supreme Court effective July 1, 1975. This coverage includes all appeals to and review by the Court of Appeals and the Supreme Court. It does *not* include certain other "appeals" within the General Court of Justice: i.e. appeals from clerk of superior court to judge of superior court under §§ 1-272 et seq.; from quasi-judicial bodies to superior court, as under §§ 143-306 et seq. [repealed]; and from magistrate to district court for trial de novo under §§ 7A-228 et seq.

Subdivision (b) expresses a fundamental limitation on the scope of the rule-making power of the Supreme Court under which these Rules are promulgated. The essential rule-making power is grounded in the Constitution which, in Art. IV, § 13(2), confers upon the Supreme Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." The same section forbids exercise of that power in a way which would "abridge substantive rights or abrogate or limit the right of trial by jury." This Rule further disclaims any power or intention by the Court that the Rules be interpreted in any way to alter the jurisdiction of the courts of the appellate division as prescribed by Constitution and statute. This simply expresses a further restriction on the rule-making power which, though not explicit in the Constitution as is the limitation above noted, is certainly implicit in the general "separation of powers" provision, Art. I, § 6.

Subdivision (c) is self-explanatory.

CASE NOTES

Mandatory. — The North Carolina Rules of Appellate Procedure are mandatory, and for violation of the rules an appeal is subject to dismissal. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982), appeal dismissed & cert. denied, 307 N.C. 470, 299 S.E.2d 224 (1983); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982).

The North Carolina Rules of Appellate Procedure are mandatory. Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976); State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981).

The rules of this court, governing appeals, are mandatory and not directory. They may not be disregarded or set at naught (1) by act of the legislature, (2) by order of the judge of the superior court, (3) by consent of litigants or counsel. The court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Quoted in Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979).

Cited in Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Rule 2

Suspension of Rules

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary. This Rule expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases where this is necessary to accomplish a fundamental purpose of the rules. The power does not of course depend upon its express reservation by the Court in the body of the Rules. It is included here as a reminder to counsel that the power does exist, and that it may be drawn upon by either appellate court where the justice of doing so or the injustice of failing to do so is made clear to the court. The phrase "except as otherwise expressly provided" refers to the provision in Rule 27(c) that the time limits for taking appeal laid down in these Rules (i.e. Rules 14 and 15) or in "jurisdictional" statutes which are then replicated or cross-referred in these Rules, i.e. Rules 3 (civil appeals), 4 (criminal appeals) and 18 (agency appeals), may not be extended by any court.

CASE NOTES

Consideration of Constitutional Questions Not Properly Raised Below. — While the Supreme Court will generally refrain from deciding constitutional questions which are not raised or passed upon in the trial court or properly presented in the Court of Appeals, the court may pass upon constitutional questions not properly raised below in the exercise of its supervisory jurisdiction. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Consideration of Judgment as to Attorney Fees Despite Failure to Present and Argue Issue. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to this rule, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Applied in Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); Harper v. Harper, 50 N.C. App. 394, 273 S.E.2d 731 (1981); Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); State v.

Booker, 306 N.C. 302, 293 S.E.2d 78 (1982); State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982); State v. Thompson, — N.C. App. —, 302 S.E.2d 310 (1983).

Quoted in Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981).

Stated in Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981).

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); Smith v. Pacific Intermountain Express Co., 39 N.C. App. 249, — S.E.2d — (1978); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); State v. Hargrove, 60 N.C. App. 174, 298 S.E.2d 402 (1982).

ARTICLE II. APPEALS FROM JUDGMENTS AND ORDERS OF SUPERIOR COURTS AND DISTRICT COURTS

Rule 3
Appeal in Civil Cases — How and When Taken

(a) **From Judgments and Orders Rendered in Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding during a session of court may take appeal by

(1) giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 of the Rules of Civil Procedure for a new trial or to alter or amend a judgment, or under Rule 50 of the Rules of Civil Procedure for judgment notwithstanding the verdict with or without a motion for a new trial; or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(b) **From Judgments and Orders Rendered Out of Session.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.

(c) **Time When Taken by Written Notice.** If not taken by oral notice as provided in Rule 3(a)(1), appeal from a judgment or order in a civil action or special proceeding must be taken within 10 days after its entry. The running of the time for filing and serving a notice of appeal in a civil action or special proceeding is tolled as to all parties by a timely motion filed by any party pursuant to the Rules of Civil Procedure enumerated in this subdivision, and the full time for appeal commences to run and is to be computed from the entry of an order upon any of the following motions: (i) a motion under Rule 50(b) for judgment n.o.v. whether or not with conditional grant or denial of new trial; (ii) a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) a motion under Rule 59 to alter or amend a judgment; (iv) a motion under Rule 59 for a new trial. If a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivisions (a)(2) and (b) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

Drafting Committee Note

Sources or parallels in former rules or statutes. Subdivisions (a), (b), (c): §§ 1-279, 1-280. Subdivisions (d) and (e): None.

Commentary.

Subdivision (a) carries forward the traditional code practice which has permitted appeal to be taken from judgments rendered during a session of court by either of two means: 1) oral notice given "at trial," or 2) written notice filed and served within a specified period (10 days from "entry" per subdivision (c)). The opportunity to give oral notice is extended by the Rule to other settings than the traditional "at trial" and "during a session," to include additionally the setting described as "at a hearing" on any of the typical post-verdict motions under Rules 50 and 59 of the Rules of Civil Procedure. The phrases "during a session" and "at trial" are carried forward from the old code statutory sections to describe the traditional setting for oral notice. Although questions could always have existed as to when "trial" begins and ends, bench and bar have always equated "at trial" with "in open court" and there simply has not been this difficulty. See, e.g., *Mason v. Commrs. of Moore County,* 229 N.C. 626, at 627, 628 (1948). The underlying notion behind charging all parties with notice of appeal given orally "at trial" is undoubtedly the same as that which dictates that oral *motions* suffice to charge all persons with notice when made during the course of trial, a principle long recognized in our pre-1970 code practice, *Collins v. N. C. State Hwy. & P.W. Comm.,* 237 N.C. 277 (1953), and now expressly embodied in N.C.R.Civ.P. 7(b)(1). It is in keeping with this principle that the Rule now extends the opportunity for giving oral notice of appeal to these specific, frequently used post-verdict motion hearings. Here too it seems fair to charge with notice, since parties must have been given notice of the hearings themselves. N.C.R.Civ.P. 7(b)(1), 5(a). In any event, an appellant may always elect in either setting to give written notice (within the prescribed period) rather than oral notice. And if, as will frequently be the case, the hearing is adjourned without ruling, the appellant will perforce have to use written notice when the order is later entered.

This Rule does not speak to the related matter of providing a record entry of the fact that appeal has been duly taken by either mode. The code provision, former § 1-280, cryptically required that, however appeal was taken, the appellant should "cause his appeal to be entered by the clerk on the judgment docket." This requirement of formal entry "on the judgment docket" was early held not mandatory, just so long as the record showed in some adequate way that appeal was duly taken by either mode. *Atkinson v. Asheville St. Ry.,* 113 N.C. 581 (1893). The traditional way of insuring this record entry — particularly appropriate for the oral notice — came to be by using practically standardized "appeal entries" which, along with recitations concerning security and time-tables for perfecting appeal, contain a notation that appeal has duly been taken. These Rules carry forward the developed requirement of such record entry. See Rule 9(b)(ix). This latter provision clearly authorizes continued use of the customary "appeal entries" to record the taking of appeal by oral notice. In the case of appeal by filing written notice, a copy of the written notice, with filing date per Rule 9(c)(3), will clearly suffice as the record entry of the fact that appeal has been duly taken. See Committee Form 5 "Appeal Entries," with explanatory Note.

Subsection (2) of subdivision (a) requires that service of copies of a written notice of appeal be made by the appellant upon all *other* parties, not just *adverse* parties as under the formerly controlling code provision, now repealed § 1-280. The primary reason for extending the requirement of notice to other than adverse parties is to tie into the provision of subdivision (c) which tolls the time for taking appeal as to all other parties when any party takes a timely appeal. Another reason is that it may sometimes be difficult to determine just who is such an "adverse" party. Co-parties may in some situations be "adverse." *Rose v. Baker,* 99 N.C. 323 (1888) (interest of co-defendant not given notice of appeal may not be adversely affected upon appellate review). This rule avoids any necessity for making such a determination. Rule 26, which is cross-referred in subdivision (c) of this Rule for the manner of making service, provides such simple and ready means that the requirement of all-party service seems not burdensome.

Subdivision (b) carries forward the traditional practice by which appeals from judgments not rendered in session (hence not subject to appeal by oral notice "at trial") may of course be taken by filing and serving written notice of appeal within the time provided in subdivision (c).

Subdivision (c) provides the timetable for taking appeal by written notice. It thus is in

play in all situations where appeal is not taken by oral notice. The basic time limit is the traditional 10 days of code practice. But this time commences to run from a different point than did the period under former statutes (as judicially interpreted). Under former law, the time was stated to run from the date of "rendition" of a judgment in session, and from the date of "notice" of a judgment rendered out of session. § 1-279. By judicial interpretation these points in time had been fixed, respectively, as the last day of the session and as the date when the judgment was filed in the clerk's office. 2 McIntosh, *North Carolina Practice and Procedure in Civil Cases,* § 1783(1) 2d ed. (1956). Under this Rule 3 the time begins to run with respect to *any* civil judgment, whether rendered in or out of session, from the date of its "entry." "Entry" is a word of art with a precise meaning now dictated by Rule 58 of the Rules of Civil Procedure. However satisfactory the procedure under Civil Rule 58 generally, its clear specification of the act which accomplishes "entry" of a judgment of any kind, coupled with its requirement that this be made a matter of record, provides counsel with sure means of determining for purposes of appeal that judgment has been entered and the time of its entry. This subdivision contains two other important innovations. The first causes the running of appeal time to be tolled by the filing of a post-verdict motion under either Rule 50, 52 or 59 of the Rules of Civil Procedure, with the period recommencing upon the entry of an order upon the motion. (A result only partially achieved by 1971 amendment to § 1-279 which gave this effect only to Rule 59 motions.) The second avoids any further need for the so-called "protective" appeal by a party who is content to abide the judgment unless some other party takes appeal, but who wants to go up as an appellant if this transpires, and who therefore has been forced to give notice of appeal against the possibility that another party will take appeal at the last moment. This awkwardness is avoided by the provision that the timely taking of appeal by any party automatically gives all other parties 10 additional days from that time to note appeal.

Subdivision (d) includes a new requirement of specific elements to be included in a written notice of appeal. These conform to generally accepted ideas of what such a notice should contain and, indeed, to customary practice in this state. See F.R.App.P. 3(c) and 3 *Douglas Forms,* Form 1168. In particular, the specification of the exact order or the portion of a judgment from which appeal is taken may save against occasional confusion. Federal courts under a comparable rule have not commonly treated any but the most misleading error in the required specification as vitiating the appeal. See, e.g., *Higginson v. U.S.,* 384 F. 2d 504 (6th Cir. 1967) (wrong order designated; deemed corrected by correct identification in brief); *Graves v. General Insurance Corp.,* 381 F. 2d 517 (10th Cir. 1967) (designation of wrong court harmless under circumstances). See Committee Forms 1 and 2.

Subdivision (e)'s cross-reference to the general "Filing and Service" rule, Rule 26, is made in order to insure counsel's attention to the variety of means by which service of the required copies of the notice of appeal may be made. See Commentary to subdivision (a), section (2). Since "taking" appeal by written notice requires both filing and service within the 10-day period, App. R. 3(a)(2), counsel must be careful to effect *service* as well as filing within the time. The most obvious way to do this is by the use of mail which, properly posted, is effective upon posting, or, where convenient, hand delivery to counsel or to an employee or partner at his office. App. R. 26(c). Service by an officer, though authorized by this same subdivision of Rule 26, is of course less subject to control, and will be effective only upon consummation of service.

General. It should be noted that the statutes which have heretofore been the sole sources for the procedure in "taking" appeal, §§ 1-279, 1-280 (for civil appeals) and § 15-180 (which for criminal appeals simply borrowed the civil procedure), have been substantially amended to incorporate the basic changes in this procedure which is now incorporated in this Rule 3 and in following Rule 4 (for criminal appeals). Indeed, the controlling statutes and Rules now simply replicate each other. See § 1-279, as re-written in 1975, and § 15-180.3, enacted in 1975, to parallel the two rules in the respects described in the rule commentaries.

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

CASE NOTES

Subsection (a) is almost identical to § 1-279(a). Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The provisions of § 1-279 and this rule are jurisdictional and unless these statutes are complied with, the appellate court acquires no jurisdiction of the appeal and it must be dismissed. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of both § 1-279 and this Rule and Rule 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with § 1-279 and this rule, is jurisdictional, and an untimely attempt to appeal must be dismissed. Booth v. Utica Mut. Ins. Co., — N.C. —, 301 S.E.2d 98 (1983).

Section 1-279 and this rule requires both filing and service of notice of appeal within 10 days after entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Where the appeal is taken more than ten days after the "entry" of judgment and the time within which the appeal can be taken is not otherwise tolled as provided in this rule and in § 1-279, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

Announcing of the court's decision in open court constitutes "entry" for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since § 1A-1, Rule 58, provides that the rendering of judgment in open court constitutes entry of judgment for purposes of those rules. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, — U.S. —, 103 S. Ct. 776, 75 L. Ed. 2d 987 (1983).

An appellant must appeal from each part of the judgment or order appealed from which appellant desires the appellate court to consider in order for the appellate court to be vested with jurisdiction to determine such matters. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

However, where defendants' Rule 12(b)(6) defense was converted and merged automatically into their Rule 56 motion, plaintiff's failure to mention specifically in her notice of appeal that portion of the trial court's order sustaining defendant's defense under Rule 12(b)(6) did not deprive the Court of Appeals of jurisdiction to hear plaintiff's appeal. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

Letter to Clerk Not Written Notice of Appeal. — In an action challenging a divorce judgment where the defendant wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, the letter was not a written notice of appeal of a divorce judgment showing that the defendant sought a review by the Court of Appeals but was a § 1A-1, Rule 59 motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Improper Appeal Criticized, But Acceptable Where Actual Notice Was Had. — While notice of appeal of a judgment rendered out of session was required by section (b) of this rule to be filed with the clerk and served on the other parties, steps taken by appellant in an attempt to perfect its appeal were minimally acceptable where the respondents were in fact put on actual notice of applicant's intent to appeal from any adverse decision where applicant stated in open court that it would appeal if it lost, and the applicant in open court requested that the proposed judgment to be submitted by respondents contain appeal entries so that applicant's notice of appeal would be perfected if the court should sign the proposed judgment; this procedure should not be repeated, however, as this rule clearly states the proper procedures to be strictly followed. In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Though clerk's notation in minutes of court is ordinarily date from which time for notice of appeal under subdivision (c) of this Rule runs, where the trial judge directed that the date of entry of the court's written order and not the earlier date of the hearing was the date of entry for purposes of appeal, the clerk should not have noted an entry of judgment on the date of the hearing. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Notice of appeal must be served on the opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

Applied in Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Hamlin v. Austin, 49 N.C. App. 196, 270 S.E.2d 558 (1980); Ramsey v. Rudd, 49 N.C. App. 665, 272 S.E.2d 162

(1980); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

Cited in In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843 (1982).

Rule 4

Appeal in Criminal Cases — How and When Taken

(a) **Manner and Time.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 10 days after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the 10-day period following entry of the judgment or order.

(b) **Content of Notice of Appeal.** The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26 of these rules.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been sentenced to life imprisonment or death shall be filed in the Supreme Court. In all other criminal cases such appeals shall be filed in the Court of Appeals.

Drafting Committee Note

Sources and parallels in former rules and statutes: §§ 15-180, 1-279, 1-280.

Commentary.

See the *General Commentary* to Rule 3 which points out the statutory amendments made in conjunction with promulgation of these rules to bring the two into conformity on the procedure for taking appeal from the trial courts.

Subdivision (a) carries forward traditional practice by which in criminal cases (borrowing the code procedure for civil appeals) appeal may be taken either by oral notice given at trial or by written notice within a specified time after judgment. The traditional time of 10 days is also carried forward. Under formerly controlling statutes (§ 1-279, borrowed for criminal appeals by § 15-180) this time commenced to run upon "rendition" of judgment, and by judicial interpretation this event was fixed as the last day of the session at which rendered. This judicial gloss is now incorporated expressly in the Rule to accord with customary practice. (Note that this differs from the starting point for the running of time in civil appeals, which is the date of "entry" of judgment under Rule 58 of the Rules of Civil Procedure. See commentary to subdivision (a) of Rule 3.) Taking appeal, when written rather than oral notice is given, involves both *filing* and *service* of the notice, with service of copies required only upon *adverse* parties. (Note again a difference from the procedure in civil appeals, under which per App. R. 3(a) and (b) service is required upon all *other* parties.) Obviously, when a criminal defendant appeals, there is only one such adverse party, the State. § 1-5. In the infrequent situations in which the State may appeal, § 15-179, if there are multiple defendants, service must be upon all of them. The reasons for not requiring criminal defendants to serve copies upon any co-defendants are: 1) the practical difficulty of doing so in sit-

uations of confinement, and 2) the absence of any provision in criminal appeals similar to that in Rule 3(c) for civil appeals which tolls the running of appeal time for all other parties when timely appeal is taken by any party.

Because it is not the practice to enter any judgments or orders from which appeal would lie in a criminal action except during a session of court, this Rule 4 does not contain any provision like that in App. R. 3(b) which provides for appeals in civil actions from judgments rendered out of session. If an appealable judgment or order were to be entered out of session (whether authorized or not), it is obvious that appeal must then be taken by filing and serving written notice.

Subdivision (b). See commentary to subdivision (d) of Rule 3, and Committee Forms 1 and 2.

Subdivision (c). See commentary to subdivision (e) of Rule 3.

Effect of Amendments. — The amendment adopted October 4, 1978, effective January 1, 1979, substituted "after entry of the judgment or order or within 10 days after a ruling on a motion for appropriate relief made during the 10-day period following entry of the judgment or order" for "after the last day of the session at which rendered" at the end of subdivision (2) of subsection (a).

The amendment adopted July 13, 1982, and effective upon adoption, added subsection (d).

CASE NOTES

Requirement Where Appellate Review of Criminal Convictions Provided. — While the State has no duty to provide for appellate review of criminal convictions, when it does, it must assure indigent defendants an adequate opportunity to present their claims. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979).

Rule 5

Joinder of Parties on Appeal

(a) **Appellants.** If two or more parties are entitled to appeal from a judgment, order, or other determination and their interests are such as to make their joinder in appeal practicable, they may give a joint oral notice of appeal or file and serve a joint notice of appeal in accordance with Rules 3 and 4; or they may join in appeal after timely taking of separate appeals by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties.

(b) **Appellees.** Two or more appellees whose interests are such as to make their joinder on appeal practicable may, by filing notice of joinder in the office of the clerk of superior court and serving copies thereof upon all other parties, so join.

(c) **Procedure after Joinder.** After joinder, the parties proceed as a single appellant or appellee. Filing and service of papers by and upon joint appellants or appellees is as provided by Rule 26(e).

Drafting Committee Note

Sources and parallels in rules and statutes: None.

Commentary.

While former statutes and rules obviously contemplated appeals involving multiple parties, and occasionally alluded to the special problems thereby created (as in Sup. Ct. R. 19(2)), they were basically designed to fit the single appellant-single appellee pattern. Specifically, they made no direct provision for joinder on appeal of either appellants or appellees. Since this can be a helpful procedure,

this Rule 5 directly authorizes it and lays down quite simple procedures to accomplish joinder. While joinder of appellants will be much more common, appellees may also desire to join on occasion, and subdivision (b) provides for this. The main advantage derived from joinder on either side is reduction in the paper work and effort required, particularly in respect of service of various papers required to be served on all parties. Subdivision (c) cross-refers to a provision in Rule 26, the general filing and service rule, which makes service on any party joined on appeal service on all so joined, thereby insuring this advantage.

Related Rules dealing with other aspects of multiple-party appeals are Rule 11(d) (single record on appeal despite multiple appellants proceeding separately); Rule 26(f) (service on numerous parties proceeding separately); and Rule 11(b) and (c) (procedure for settling record where multiple appellees proceeding separately).

CASE NOTES

Applied in Board of Transp. v. Terminal Whse. Corp., 300 N.C. 700, 268 S.E.2d 180 (1980).

Rule 6

Security for Costs on Appeal in Civil Actions

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a certificate of the clerk of the trial tribunal showing cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (b), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

Drafting Committee Note

Sources and parallels in former rules and statutes: §§ 1-285, 1-286, 1-287, 1-288; Court of Appeals Rule 6(a).

Commentary.

Subdivision (a) simply cross-refers to the statutes which require that ordinarily security

for costs be provided as a condition to the right to prosecute an appeal and prescribe the mode of setting and perfecting such security. This basic requirement bears so directly upon the financing of the court system that it seems properly a matter for legislation rather than judicial rule-making as the authoritative source. Cross-reference in these Rules is simply in the interest of the completeness of their coverage of each critical step in the process.

Subdivision (b) similarly cross-refers to the statutory exception to the basic requirement — that of appeals in forma pauperis — and is for the same purpose as stated for subdivision (a).

Subdivision (c) carries forward a requirement of former Court of Appeals Rule 6(a) that the appeal bond be filed *with* the record on appeal. That rule did not, as does this, make alternative provision for filing certificate of the provision of cash deposit in lieu of bond, an alternative clearly permitted by § 1-286.

Subdivision (d) picks up procedures formerly spelled out in §§ 1-285 and 1-287 by which failures properly to provide required security or to file evidence thereof with the record on appeal may be brought to the attention of the appellate court and made the basis of dismissal or of correction. These provisions have been removed from the cited statutes by 1975 amendments on the basis that they pertain more properly to the appellate rule-making power. The substance of these procedures is unchanged, so that no change of established practice is involved. The cross-reference is to the general motion practice rule, Rule 37.

CASE NOTES

Cited in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Rule 7

[Reserved]

Editor's Note. — Rule 7 was repealed by amendment effective July 1, 1978, adopted June 19, 1978.

The order repealing this rule provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Rule 8

Stay Pending Appeal in Civil Actions

When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must ordinarily first be sought by the deposit of security with the clerk of the superior court in those cases for which provision

is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases. After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23. Application for the writ of supersedeas may similarly be made to the appellate court in the first instance when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.

Drafting Committee Note

Sources and parallels in former rules and statutes: Former Sup. Ct. R. 34(2).

Commentary.

The act of taking appeal in a criminal case automatically stays execution of judgment pending disposition of the appeal. G.S. § 15-184. The situation is not as simple with respect to civil judgments, and this Rule speaks to that situation in order to interrelate the procedures for obtaining stay of execution of such judgments at the trial court level with the supersedeas writ practice by which stay may be obtained from an appellate court under the provisions of App. R. 23.

The procedure for obtaining stays at the trial court level is controlled by N.C.R.Civ.P. 62. That rule contains internal provisions for obtaining stays of some judgments by motion, and cross-refers to certain statutes which provide for automatic stays of other specific judgments by deposit of security in the trial court. The basic thrust of this Rule 8 and the interrelated supersedeas rule, App. R. 23, is to require that, ordinarily, a party must have attempted unsuccessfully to obtain or to hold a stay order at the trial court level under the provisions of N.C.R.Civ.P. 62, before being permitted to seek stay by writ of supersedeas from the appellate court. "Stay order" as used in this rule includes orders which are in effect continuations of injunctive relief which has been vacated by the trial court judgment or order from which appeal has been taken, or which "suspend," pending disposition of an appeal, injunctive relief granted by the judgment or order from which appeal is taken. See N.C.R.Civ.P. 62(c).

CASE NOTES

Cited in In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Rule 9

The Record on Appeal—Function, Composition, and Form

(a) **Function.** In appeals of right from the district courts and superior courts, review is solely upon the record on appeal constituted in accordance with this Rule 9.

(b) **Composition.**

(1) **In Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a copy of a stipulation of counsel showing the same; (iv) copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where

error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law; (viii) a copy of the judgment, order, or other determination from which appeal is taken; (ix) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (x) copies of all other papers filed and transcripts of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned, and (xi) exceptions and assignments of error set out in the manner provided in Rule 10.

(2) **In Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a copy of a stipulation of counsel showing the same; (iv) copies of all petitions and other pleadings filed in the superior court; (v) a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken; (vi) copies of all items included in the record of administrative proceedings which were filed in the superior court for review; (vii) so much of the evidence taken before the board or agency and in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (viii) a copy of the notice of appeal from the superior court, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the superior court, set out as provided in Rule 10.

(3) **In Criminal Actions.** The record on appeal in criminal actions shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing; (iii) copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court; (iv) copies of docket entries or of a stipulation of counsel showing all arraignments and pleas; (v) so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given; (vii) copies of the verdict and of the judgment, order, or other determination from which appeal is taken; (viii) a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal; (ix) copies of all other papers filed and proceedings had in the trial courts which are necessary for an understanding of all errors assigned, and (x) exceptions and assignments of error set out as provided in Rule 10.

(4) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(5) **Inclusion of Unnecessary Matter: Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(6) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative the appellate court may order additional portions of a trial court record sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal amended to correct error shown as to form or content.

(c) **Form — General Provisions.**

(1) **Evidence — How Set Out.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(b) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form.

Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. This alternative also may be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and a stenographic transcript of those proceedings has been made. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c); and, in criminal appeals, the District Attorney upon certification of the record shall forward one copy of the settled, certified transcript to the Attorney General of North Carolina.

(2) **Exhibits.** (i) Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by stipulation of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(ii) Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed as part of the record on appeal. When an original exhibit has been settled as a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the court to which appeal is taken. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the record on appeal.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively. At the end shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282, Sup. Ct. (and Ct. App.) Rules 19, 20, 21, 22, 23, 26.

Commentary.

General. This Rule, in subdivision (b), contains a fundamentally new approach to prescribing the composition of the record on appeal. The traditional formula of the code and implementing rules of a "record proper," supplemented where required by a "settled case on appeal," is here abandoned in favor of a detailed enumeration of required items for each of the three types of cases which can be appealed from the trial courts to the appellate courts: civil actions, subd. (b)(1); criminal actions, subd. (b)(2); and appeals from superior court administrative agency reviews, subd. (b)(3). Over the years the practice had already essentially moved around the theoretical code design, as the exact composition of the "record proper" became less and less clear. The device of a specific listing of items is designed to make more certain the process of composing the record on appeal and so to reduce some of the confusion clearly indicated in records and court discussions of imperfectly composed records arising to some extent from the code terminology and its related procedures.

While perhaps obvious, it may be worth emphasizing that although this Rule abandons the distinctive code terminology and some of its related technicalities for composing the record on appeal, it retains the two most fundamental features of the code approach. 1) Use of authenticated copies of trial court record items (plus reporter's transcript), rather than the original trial court papers themselves; and 2) A forced selection of items for inclusion in the record on appeal, rather than using the entire trial court record. This approach continues therefore to be fundamentally distinguished from the "appeal on the original papers" approach now utilized in the federal and some state procedural systems, where the selection process occurs only in the items included in the appendix to the brief. The selection process under this Rule is dictated with respect to enumerated items which may or may not be relevant from case to case, such as jury instructions and other elements of the trial process, by those provisions which admonish inclusion only "when necessary to understand errors assigned." It is in this way that the case-by-case flexibility of composition of the code's "settled case" is carried forward. Counsel should be alert to one fundamental change which this approach involves. Formerly, if appeal could be prosecuted on the "record proper," appellant need not either obtain agreement of appellee nor make service upon him of a "statement of case on appeal," but could merely have the clerk certify the items constituting the "record proper," and docket this as the complete "record on appeal" in the appellate court. See, e.g., *Edwards v. Edwards,* 261 N.C. 445 (1964) (appeal from judgment on the pleadings). Under the new rule, even in such a case he must either obtain agreement of counsel to these items as the "record on appeal" under Rule 11(a), or serve them upon him in a "proposed record on appeal" for acceptance under Rule 11(b) or judicial settlement under Rule 11(c).

While the Rule requires routine inclusion in the record on appeal of all those items which clearly would have been considered parts of the "record proper" under the code (e.g. items iii, iv, vii, viii of subd. (b)(1) for civil appeals), it should be noted that Rule 12(c) provides that even these items may be excluded from those work copies of the formal record on appeal actually prepared by the appellate court clerk for direct consideration by the members of his court. This lays the basis for a two-stage selection process which if carefully followed will produce: 1) an original record on appeal, available for inspection by the court, which is broad enough in scope to allow fair consideration in relevant context of all errors properly to be considered; but 2) "work" copies for individual members of the courts from which have been excluded any formally required items in the original record (such as pleadings, jurisdictional statements or papers) which are not relevant to consideration of particular errors assigned by the parties. Cf. former Sup. Ct. R. 22 and see Commentary to Rule 12(c).

Subdivision (b)(1)-(3). While most of the items enumerated for inclusion in the original records on appeal in these three categories of cases are self-explanatory, it may be helpful to relate some to practice under former statutes and rules.

Item (ii) in subsections (1), (2), (3): "a statement identifying the judge, etc." This is designed to perform the function of the "organization of the court" item indirectly required by former Sup. Ct. R. 22, and traditionally

included by counsel in widely varying form in the original record on appeal. The office of this item is simply to permit routine confirmation by the appellate court of the subject matter jurisdiction or "competence" of the particular trial judge and tribunal, whether or not any jurisdictional question has been directly raised by the parties on appeal. See N.C.R.Civ.P. 12(h)(3) (lack of subject matter jurisdiction may be noted by court at any stage of proceedings). The elements enumerated are sufficient for this purpose when rounded out by the court's range of judicial notice. If peripheral questions of "organization" such as the composition of grand or petit jury are to be drawn in question, this should be done by specific assignment of error with relevant parts of the record specially included.

Item (iii) in subsections (1) and (2), "a copy of the summons, etc." This is designed to provide a record showing of the existence of "judicial" jurisdiction of the trial tribunal, whether personal over the defendant, in rem, or quasi in rem, and however based and exercised. Under Code practice it had consistently been understood that the *summons* constituted a part of the "record proper," so must be included in the original record on appeal. *Cressler v. City of Asheville,* 138 N.C. 484 (1905) ("summons, pleading and judgment"). And Sup. Ct. R. 22 built indirectly upon this by providing that the summons so included need not be included in the "printed" copies prepared by the Clerk. Both of these prescriptions, framed in an earlier day of simple process and jurisdiction rules, were too narrowly confined in terms, seemingly only to cases where personal jurisdiction has been acquired by personal service of process. This new Rule speaks more contemporaneously and accurately to the underlying necessity, which is for a record showing of "judicial" jurisdiction, whether over person or property, and whether acquired by service of summons, publication, notice, appearance, waiver, or however.

Item (ix) in subsection (1); (viii) in subsections (2) and (3), "a copy of the notice of appeal, etc." This carries forward existing practice, not formerly required by statute or rule but by judicial decision, e.g., *Atkinson v. Asheville St. Ry.,* 113 N.C. 581 (1893), of including in the record on appeal a showing of appeal properly taken and perfected. This establishes as a matter of record the jurisdiction of the *appellate court* in the particular case. The way in which this has traditionally been shown is by the standardized "appeal entries" which show appeal taken orally "in open court," "further notice waived" (unnecessary), accompanied by any judicial extensions of the statutory times for serving "case" and "counter case," and the amount of appeal bond. This may certainly be continued under this Rule, but the Rule would also be complied with by inclusion of a copy of a written notice of appeal with proof of service under Rule 3(a)(2), or 3(b) and with separate showing of any judicial orders extending times for perfecting appeal. See Committee Form 5, "Appeal Entries."

Subdivision (b)(4). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (b)(5). Former Sup. Ct. R. 26 provided for recovery of the costs of printing records and briefs by the party prevailing, but limited recovery on a maximum page/maximum per page cost basis. This operated indirectly, and in experience not too successfully, as a deterrent to inclusion in the record on appeal of unnecessary matter. Former Sup. Ct. R. 26 and 19(5) also provided a more direct sanction of costs against the party responsible for the inclusion of unnecessary matter in the record on appeal, without regard to outcome of the appeal. This sanction had apparently seldom been invoked. This subdivision of the new rule abandons the page/cost per page limitations on recovery of printing costs by a prevailing party, and retains the sanction of imposing costs of unnecessary portions on the offending party. It has two new features: 1) The sanction is not dependent upon an opposing party's objection, but may be imposed by the court on its own initiative; 2) The costs are chargeable directly against *counsel* as well as a party in the court's discretion.

Subdivision (b)(6). Self-explanatory. Cf. former Sup. Ct. R. 19(1).

Subdivision (c)(1). The problem of incorporating evidence in the record on appeal has two aspects: 1) determining that portion of the total received (or offered) to be included, and 2) the mode of setting out *testimonial* evidence. This subdivision addresses the latter aspect.

The best possible incorporation of testimonial evidence in a record on appeal would 1) include no more than is minimally required for reviewing errors assigned; 2) set out in narrative summary form that which merely lays an undisputed factual context or provides an undisputed factual background; and 3) set out in question-and-answer form all that wherein shades of meaning, nuances of expression, and ambiguity of question or response bear obviously upon the sense and credibility of testimony. An all-narrative summary undoubtedly obscures the true sense of much critical testimony, tends to encourage inclusion of unnecessary portions, and is exceedingly time-consuming. An all-verbatim transcript inevitably includes long passages of confused questions and answers frequently leading finally to the establishment of purely peripheral fact which though necessary as context or background is not really disputed and could be compressed fairly into summary

form. Generally speaking, it is obvious that a narrative form is easier for the reviewing court to use, while a verbatim question-and-answer form is easier for counsel to prepare. The problem has been and remains one of accommodation to these conflicting interests and values. This subdivision attempts a new accommodation. Its first sentence continues, for obvious reasons, the traditional requirement that evidence whose admission or exclusion is assigned as error be included in question-and-answer form. The rest of the subdivision involves a limited relaxation of the former flat requirement of narrative form for all other testimonial evidence included. The idea expressed is that this remains the ordinarily preferred and required form, but with the option given to use question-and-answer form where the narrative would obscure particular testimony's true sense. With this option given, it may inevitably become the object of disagreement between counsel during the process of composing the record on appeal. To aid both counsel and any judge required to settle such a dispute as to form, the last paragraph of this subdivision is devoted to a general statement of the considerations properly to be used in determining the fitness of the particular mode in dispute. These are to be brought into play in the normal process, set out in Rule 11, of settling the record — whether by agreement, acceptance through adversarial exchange, or judicial settlement. In this process the appellant will obviously have the first opportunity to choose the form or forms to be used (after having first selected those portions of the total evidence which are to be included in any form). This choice might be exercised informally in a proposal to the appellee for an agreed record on appeal, or in a formal "proposed record on appeal" served upon the appellee. In the latter situation an appellee might either formally object to the proposed form, or include a different form in his "proposed alternative record on appeal." In either case, judicial settlement as to the propriety of the disputed form would then be forced.

Subdivision (c)(2) deals in its two subsections with two different kinds of exhibits which may be required items in the record on appeal. Subsection (i) deals with documentary exhibits (ordinarily will not have been introduced in evidence) which are attached to or are parts of items required to be included in the record on appeal under Rule 9(b) (such as pleadings). On motion these may be excluded as unnecessary to the appeal from the item of which they are a part or to which they are attached, though the item itself must be included in the record on appeal. Subsection (ii) deals with evidentiary exhibits, both documentary and other, which are required items in the record on appeal. If documentary, three copies must be filed with the record. If not documentary only the original, for obvious reasons, need be filed. To protect clerks in their custodial responsibility against the possible loss or damage to such exhibits, G.S. § 7A-106, the rule provides that these may be transmitted directly by the clerk to his appellate court counterpart without relinquishing their custody to counsel.

Subdivision (c)(3). Self-explanatory. From former Sup. Ct. R. 19(1).

Subdivision (c)(4). Self-explanatory. From former Sup. Ct. R. 19(1).

Commentary on 1981 Amendments. — These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeal, e.g., pleadings, jury instructions, judgments, etc., should be contained in the record on appeal as required by appropriate appellate rules.

Effect of Amendments. — The amendment effective Oct. 1, 1981, adopted June 10, 1981, added the third paragraph of subsection (c)(1).

The amendment adopted Jan. 12, 1982, and effective for all appeals docketed after March 15, 1982, added the second sentence to the third paragraph of subdivision (c)(1) and added at the end of the present third sentence of that paragraph the language beginning "and, in criminal appeals."

CASE NOTES

The defendant appellant has the duty to see that the record on appeal is properly made up. State v. McCain, 39 N.C. App. 213, 249 S.E.2d 812 (1978); Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980); West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

It is the appellant's duty and responsibility to see that the record is in proper form and complete. State v. Alston, 307 N.C. 321, 298 S.E.2d 631 (1983).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Appellant's brief is not a part of the record on appeal. West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980), rev'd on other grounds, 302 N.C. 201, 274 S.E.2d 221 (1981).

Objection When Ruling Made. — Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Waiver of Objections. — Where plaintiffs failed to object at trial to the failure of defendant to state specific grounds for its motion for a directed verdict, plaintiffs, therefore, cannot raise such objection on appeal. Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517, cert. denied, 302 N.C. 402, 279 S.E.2d 357 (1981).

A judgment is a necessary part of the record on appeal of a criminal action. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by § 1-180. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it. State v. Harrell, 50 N.C. App. 531, 274 S.E.2d 353 (1981); State v. Taylor, — N.C. App. —, 300 S.E.2d 890 (1983).

Subdivision (c) provides an alternative to narrating evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (Rule 9 or 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

Narration of the evidence as specified in subdivision (c) is mandatory. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977), decided prior to the 1981 amendment which added the third paragraph of subsection (c)(1).

Rule 28(b)(4) serves the same function that subdivision 9(c)(1) of this rule serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

Rule 28(b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by subdivision (c)(1) of this rule carefully follow the requirements of Rule 28(b)(4) in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of Rule 28 is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

Rule 28 only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evi-

dence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, — N.C. —, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

Items Arranged Chronologically. — Each item in the record on appeal should be arranged chronologically, in the same order in which it occurred at trial. State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861, cert. denied, 303 N.C. 183, 280 S.E.2d 455 (1981).

Subdivision (b) (3) (ix) is broadly worded so as to include any proceeding in any court which would be material to the consideration of the case on appeal. If there is a question as to the relevancy of the proceedings from other courts, the parties may settle the dispute according to the procedures provided in Rule 11. The trial judge properly ordered the inclusion of the voir dire of a previous trial into the record. State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Counsel's failure to timely file the record on appeal in a criminal prosecution amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Counsel Taxed with Costs for Filing Redundant Records. — Because counsel representing one codefendant and counsel representing the other defendants filed two records instead of one and because they included unnecessary material in each of the records filed, each counsel will be personally taxed with a portion of the costs. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Because of the filing of an unnecessary record on appeal and because unnecessary matter was included in the records filed, counsel for defendants will be personally taxed with a portion of the costs. State v. Ashe, 30 N.C. App. 74, 226 S.E.2d 398 (1976).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Minutes Are Not Substitute for Copy of Judgment. — The "minutes" of the trial court in a criminal action included in the record on appeal are not a substitute for a copy of the judgment. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Omission of Necessary Part of Record. — When a necessary part of the record on appeal of a criminal action has been omitted, the appeal will be dismissed. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Record Silent as to Jurisdiction of Lower Court. — When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Applied in Johnson v. Hooks, 27 N.C. App. 584, 219 S.E.2d 664 (1975); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); Williams v. Williams, 31 N.C. App. 747, 230 S.E.2d 428

(1976); State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Dixon, 33 N.C. App. 78, 234 S.E.2d 37 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); State v. Spruill, 33 N.C. App. 731, 236 S.E.2d 717 (1977); State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327 (1977); State v. Truzy, 44 N.C. App. 53, 260 S.E.2d 113 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); State v. Clark, 300 N.C. 116, 265 S.E.2d 204 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. Washington, 51 N.C. App. 458, 276 S.E.2d 470 (1981); Burns v. McElroy, — N.C. App. —, 291 S.E.2d 278 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982), appeal dismissed & cert. denied, 307 N.C. 470, 299 S.E.2d 224 (1983); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); West v. Slick, — N.C. App. —, 299 S.E.2d 657 (1983); State v. Willis, — N.C. App. —, 300 S.E.2d 829 (1983).

Quoted in Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977); Wright v. Asheville Pool & Gunite Co., 44 N.C. App. 80, 259 S.E.2d 797 (1979); State v. Jorgenson, 51 N.C. App. 425, 276 S.E.2d 707 (1981).

Stated in Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); State v. Grimes, 47 N.C. App. 476, 267 S.E.2d 387 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); State v. Pennell, 54 N.C. App. 252, 283 S.E.2d 397 (1981); State v. Earnhardt, 57 N.C. App. 299, 290 S.E.2d 376 (1982).

Cited in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Davis v. Zoning Bd. of Adjustment, 41 N.C. App. 579, 255 S.E.2d 444 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850 (1980); State v. Sinclair, 301 N.C. 193, 270 S.E.2d 418 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980); In re Ford, 49 N.C. App. 674, 272 S.E.2d 157 (1980); State v. Williams, 303 N.C. 507, 279 S.E.2d 592 (1981); Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); State v. Monroe, 57 N.C. App. 597, 292 S.E.2d 21 (1982); State v. Woodrup, 60 N.C. App. 205, 298 S.E.2d 439 (1982); State v. Proctor, — N.C. App. —, 302 S.E.2d 812 (1983).

Rule 10

Exceptions and Assignments of Error in Record on Appeal

(a) **Function in Limiting Scope of Review.** Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal.

(b) **Exceptions.**

(1) **General.** Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error. Bills of exception are not required. Each

exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

(2) **Jury Instructions; Findings and Conclusions of Judge.** No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. In the record on appeal an exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference. An exception to the failure to give particular instructions to the jury, or to make a particular finding of fact or conclusion of law which finding or conclusion was not specifically requested of the trial judge, shall identify the omitted instruction, finding or conclusion by setting out its substance immediately following the instructions given, or findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

(3) **Sufficiency of the Evidence.** — A defendant in a criminal case may not assign as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial. If a defendant makes such a motion after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of State's evidence is waived. Such a waiver precludes the defendant from urging the denial of such motion as a ground for appeal.

A defendant may make a motion to dismiss the action or judgment as in case of nonsuit at the conclusion of all the evidence, irrespective of whether he made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of his motion made at the conclusion of all the evidence. However, if a defendant fails to move to dismiss the action or for judgment as in case of nonsuit at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged.

If a defendant's motion to dismiss the action or for judgment as in case of nonsuit is allowed, or shall be sustained on appeal, it shall have the force and effect of a verdict of "not guilty" as to such defendant.

(c) **Assignments of Error — Form.** The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. Each assignment of error shall be consecutively numbered; shall, so far as practicable, be confined to a single issue of law; shall state plainly and concisely and without argumentation the basis upon which error is assigned; and shall be followed by a listing of all the exceptions upon which it is based, identified by their numbers and by the pages of the record on appeal at which they appear. Exceptions not thus listed will be deemed abandoned. It is not necessary to include in an assignment of error those portions of the record to which it is directed, a proper listing of the exceptions upon which it is based being sufficient.

(d) **Exceptions and Cross Assignments of Error by Appellee.** Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Portions of the record necessary to an understanding of such

cross-assignments of error may be included in the record on appeal by agreement of the parties under Rule 11(a), or may be included by the appellee in a proposed alternative record on appeal under Rule 11(b).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-282; Sup. Ct. Rules 19(3) and 21.

Commentary.

General. A necessary feature of any system of appellate procedure which uses a selectively composed record on appeal rather than the entire trial court record is some such sifting process as that embodied in the "exception/assignment of error/questions presented in brief" process brought forward in these rules from code practice. The function and operation of this essential process have been poorly described in former rules and statutes and erratically applied in practice. It is the purpose of this Rule 10 better to describe both intended function and details of operation in an effort to improve practice in this critical area.

Subdivision (a) seeks to express the intended function of this process, and does so in a paraphrase of various formulae used by the courts over the years in their frequently frustrated attempts to police the practice. See, e.g., *State v. Dickman,* 249 N.C. 759 (1959); *Nye v. Devel. Co.,* 10 N.C. App. 676 (1971). The sifting function which is implicit in this statement might be expressed in more specific form as follows. 1) Every judicial action at the trial court level constitutes potentially prejudicial error to the party disfavored by it; hence the total of such actions which disfavor the eventually losing or "aggrieved" party constitute the pool of potentially reversible errors on appeal. 2) But no such error ought be the subject of appellate review unless it has been first suggested to the trial judge in time for him to avoid it or to correct it, or unless it is of such a fundamental nature that no such prior suggestion should be required of counsel. The classic way of making a required suggestion of error in the trial court is by the formal "exception" orally announced, or presented in writing in apt time. Other less formal means of suggesting error may of course be equally effective, so that an "exception" may be "preserved" by them. N.C.R.Civ.P. 46(b) ("formal exceptions ... unnecessary"). Other error may be considered of such serious consequence that it requires no suggestion from counsel, and is by law "deemed excepted to." N.C.R.Civ.P. 46(c) (instructions to jury). 3) Whether an exception to it has been actually taken or merely "deemed" taken, the fact that error will be asserted on appeal in respect of particular judicial action must be noted in the record on appeal, first for the benefit of the adverse party, then for the reviewing court. This requires that each such exception be there "set out" in some way which sufficiently identifies the judicial action to which it is addressed. 4) All such exceptions should then be made the basis of formal "assignments of error" in the record on appeal. These constitute in effect the "pleadings" on appeal, for they signal to the adversary the points of law which will be urged on appeal. Each should be confined to a single issue of law, and all exceptions pertinent to this issue should be visibly "grouped" under that assignment of error. This fixes the potential scope of review, and therefore enables the appellee to assess the appropriateness of the record on appeal as proposed by the appellant. 5) From among these "assignments of error" the appellant may choose in the final stage of the sifting process to use all or less than all as the basis for the questions formally to be presented for review in his written brief. These "questions presented" ultimately define the scope of review. Hence the formula: "questions presented must be supported by assignments of error which must be supported by exceptions." Or, obversely: "exceptions not made the basis of assignments of error, and assignments of error not made the basis of questions in the brief, are deemed abandoned." The last sentence proviso expresses the limited exceptions to this basic scheme. The three defects there identified are all of such fundamental significance — going to the jurisdiction of the court and to the question whether the judgment is supportable on the issues before the court — that no exception or assignment of error is required to permit their consideration on appeal. Cf. former Sup. Ct. R. 21 and see *Burroughs v. Realty Co.,* 19 N.C. App. 107 (1973). This subdivision is designed to highlight the underlying purpose behind the exception/assignment of error process in order to make more understandable the desired form and function of the two devices. These are then addressed in the next two subdivisions.

Subdivision (b)(1). The first sentence builds upon the point developed in the commentary to subdivision (a), that only those "exceptions" may be set out in the record on appeal and so made the basis of assignments of error which were taken in the trial court by the classic mode of the spoken or written word "exception"; or "deemed" taken from other conduct, as by objecting to the admission of evidence, N.C.R.Civ.P. 46(a)(2), or from other action

plainly indicating opposition to judicial action taken or proposed, N.C.R.Civ.P. 46(b); or "deemed" taken without *any* action by counsel simply because the error is considered sufficiently fundamental, as in instructions to the jury, N.C.R.Civ.P. 46(c).

It is obvious from this that it is rarely the case that an "exception" set out in the record on appeal will necessarily reflect the actual taking of a formal exception at trial. This points to the true, and limited, function of the exception "set out" in the record on appeal: it is merely to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error. Recognition of this quite limited function of the exception in the record on appeal explains the next two sentences in the subdivision. By the first, it is provided that a formal "bill of exceptions" need no longer be filed. Without using the exact term, former Sup. Ct. R. 21(c) plainly contemplated the filing of such a "bill" in all situations "when no case settled is necessary", i.e., when the judicial action to be assigned as error occurred with respect to a matter included in the "record proper" — such as the entering of judgment on the pleadings. When formal exception to such action at the trial court level was required in order to "preserve" exception for inclusion in the record on appeal, a written bill filed with the trial court was obviously necessary. Under N.C.R.Civ.P. 46, however, no "formal exception" to such an order is now necessary just so long as counsel resisted allowance of the motion. An exception may now be set out in the record because by this trial rule it is deemed "preserved" by that action. Of course this does not obviate the necessity that there shall have been such a plain indication by counsel of his opposition, and a written "exception" filed with the court would clearly still perform that function, whether denominated a "bill" or not. The next sentence makes plain this limited function by emphasizing that it consists simply of pointing out in the record on appeal the particular judicial action to be assigned as error, and that this does not require any statement of grounds or argumentation. The last sentence of this subsection carries forward traditional practice of consecutive numeration of the exceptions set out in the record on appeal. See Committee Form 6 A-C for illustrative examples.

Subdivision (b)(2) carries forward in its first sentence traditional practice for the clear identification of portions of the judge's charge to which exception is being set out in the record. The second sentence involves a change in the practice recently required by the court for identifying instructions whose *omission* is to be assigned as error. This requirement has been that at least a paraphrase of the instruction which counsel contends should have been given should be set out in brackets following the instructions actually given, with an appropriately numbered exception identifying it. *Duke Power Co. v. Rogers,* 271 N.C. 318, 321 (1967). By this new rule it is sufficient in such case to give the *substance* of the instruction which allegedly should have been given, rather than attempting even to paraphrase the instruction as it is contended the judge should actually have phrased it. See Committee Form 6 D.2. The same requirement is made applicable to the related subject of an exception to the failure to make certain findings of fact or conclusions of law in a non-jury case. The last sentence carries forward an established rule of decision which has prohibited "broadside exceptions" to multiple findings or conclusions. *Logan v. Sprinkle,* 256 N.C. 41 (1961).

Subdivision (c) in its first three sentences restates in condensed form the basic function and desired form of the assignment of error as developed in judicial decisions over the years. As indicated in the general commentary to this Rule, the essential function of this device is to identify for the appellee's benefit all the errors possibly to be urged on appeal, hence the total possible scope of review, so that the appellee may properly assess the sufficiency of the proposed record on appeal to protect his position on all these points. This being the function, it is sufficient that the assignment of error simply identify without argumentation the basis upon which it is asserted that error was committed, and that it identify, by simply listing ("grouping") them, the various exceptions upon which it is based. The last sentence represents a fundamental change in the required form, as the court in deference to the burden imposed upon counsel abandons the long-standing requirement that each assignment of error contain within itself those portions of the record necessary to its consideration. This rule apparently originated in 1908 in the case of *Thompson v. Railroad,* 147 N.C 412 (1908) where the Court, faced with a particularly sketchy set of assignments, adopted it in order to avoid the necessity for "making a voyage of discovery" through the record in order to deal with each assignment. This rule has been exceedingly difficult to police consistently, see *Douglas v. Mallison,* 265 N.C. 362 (1965), and *State v. Douglas,* 268 N.C. 267 (1967), and is abandoned in this rule in the hope that counsel will specify the basis of their assignments and identify the exceptions underlying them with sufficient clarity that the Court can fairly and expeditiously consider them as framed. See Committee Form 7 for illustrative examples.

Subdivision (d) introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be

found in the ground upon which their judgment was actually based. There has not been a clear-cut procedure of this sort. Such parties may not protect their judgments by becoming cross-appellants, since they are not parties aggrieved under G.S. § 1-271. *Bethea v. Town of Kenly,* 261 N.C. 730 (1964). Nor has there been a general provision by which they might as appellees "conditionally" assign error in the event the appellate court should "aggrieve" them by its decision depriving them of their favorable judgment below. Such a provision has been worked into the aggrieved party statute, G.S. § 1-271, to protect an appellee in the limited situation where as verdict winner below he wishes to argue conditionally on appeal for new trial as opposed to the judgment n.o.v. sought by appellant. It is undoubtedly the case that on occasion the Court has protected an appellee in this situation by drawing on the principle that "review is to correct judgments and not reasons." See, e.g. *Jamerson v. Logan,* 228 N.C. 540 (1948) (though plaintiff appellee's verdict not supportable on issues submitted, case remanded rather than reversed on basis prima facie case well pleaded and proved on theory not submitted to jury). But in such situations, it may well be that the appellant has not been fairly apprised of this possibility and so enabled to meet this conditional position. Both appellees and appellants should be protected in this situation, and this subdivision seeks to provide this protection by allowing an appellee conditionally to present such issues but only on the basis of cross-assignments of error which will have alerted appellant to this possibility and permitted him to protect himself both in terms of composition of the record on appeal and in preparing his brief and oral argument on the "cross-questions." Rule 28(c), which prescribes the contents of briefs, follows up on this by permitting an appellee who has made such cross-assignments of error to present in his brief for appellate review the questions thereby raised. And Rule 16, which deals with review by the Supreme Court or Court of Appeals determinations, ties in by permitting a party who as appellee presented such "cross-questions" in the Court of Appeals to present them for further review in the Supreme Court, whether he appears there as appellant or as appellee.

Commentary on 1981 Amendment. — This amendment will make North Carolina's procedure for reviewing alleged errors in the jury charge similar to that of the federal courts and many, if not most, of the other states including Connecticut, Florida, Indiana, Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and South Carolina.

Effect of Amendments. — The amendment applicable to every case the trial of which begins on or after Oct. 1, 1981, adopted June 10, 1981, in subsection (b)(2), added the present first sentence, added "In the record on appeal" to the beginning of the present second sentence, and inserted "finding or conclusion" preceding "was not specifically requested" in the present third sentence.

The order adopted July 7, 1983, added subdivision (b)(3).

Legal Periodicals. —

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

CASE NOTES

Rules of Appellate Procedure are mandatory and failure to follow the rules subjects an appeal to dismissal. Marsico v. Adams, 47 N.C. App. 196, 266 S.E.2d 696 (1980).

Question Must Be Presented on Appeal. — The proviso to subdivision (a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of App. R. 28 that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

A defendant may properly present on appeal the questions in section (a) of this Rule without taking any exceptions or making any assignments of error in the record and may properly present for review the denial of his motion for nonsuit under § 15-173 without making any exception in the record. However, in both these situations, the defendant must still bring those questions forward in his brief, argue them and cite authorities in support of

his arguments. Failure to do so means that those questions are not properly presented for review. State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979).

Review Limited to Theories and Constitutional Questions Presented Below. — The theory upon which a case is tried in the lower court must control in constructing the record and determining the validity of the exceptions. Further, a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal. State v. Cooke, 306 N.C. 132, 291 S.E.2d 618 (1982).

When a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. Harris v. Harris, — N.C. —, 300 S.E.2d 369 (1983).

Only exceptions noted in the record and made the basis for assignments of error will be considered on appeal. State v. Kidd, 60 N.C. App. 140, 298 S.E.2d 406 (1982).

Waiver by Failure to Present Question on Appeal. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Plain Error. — The term "plain error" does not simply mean obvious or apparent error. State v. Odom, — N.C. —, 300 S.E.2d 375 (1983).

In deciding whether a defect in the jury instruction constitutes "plain error," the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt. State v. Odom, — N.C. —, 300 S.E.2d 375 (1983).

The adoption of the "plain error" rule to allow for review of some assignments of error normally barred by waiver rules such as section (b)(2) of this rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate section (b)(2) of this rule which is not the intent or purpose of the "plain error" rule. State v. Odom, — N.C. —, 300 S.E.2d 375 (1983).

The plain error rule is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. State v. Odom, — N.C. —, 300 S.E.2d 375 (1983).

The purpose of section (b)(2) of this rule is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, it is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court. State v. Odom, — N.C. —, 300 S.E.2d 375 (1983).

Subdivision (b)(2) Mandatory. — Subdivision (b)(2) of this rule requiring objection to the charge before the jury retires is mandatory and not merely directory. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Subdivision (b)(2) of this rule has no application once the jury has begun its deliberations. City of Winston-Salem v. Hege, — N.C. App. —, 300 S.E.2d 589 (1983).

Section 15A-1446(d)(13) Abrogated by Subdivision (b)(2). — By enacting subdivision 10(b)(2) of this section, the Supreme Court has by preemption abrogated § 15A-1446(d)(13). State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138, cert. granted, 307 N.C. 469, 299 S.E.2d 222 (1982).

Construction of Subdivision (b)(2) with § 15A-1231. — Subdivision (b)(2) of this rule and § 15A-1231 are in conflict. Subdivision (b)(2) of this rule, however, is a rule of appellate practice and procedure, promulgated by the Supreme Court pursuant to its exclusive authority under N.C. Const., Art. IV, § 13(2). Therefore to the extent that § 15A-1231 is inconsistent with subdivision (b)(2) of this rule, the statute must fail. State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

Evidence Incompetent by Statute. — Failure of the trial judge to exclude evidence rendered incompetent by statute is reversible error, whether objection is interposed and exception noted or not. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Another exception to the waiver rule implicit in subdivision (b) is the admission of evidence contrary to a statute which precludes its admission in furtherance of some public policy of the State. In this instance failure to object to the evidence does not waive one's right to have the error considered on appeal. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Discretion of Trial Judge. — A motion to strike out testimony, to which no objection was aptly made, is addressed to the discretion of the trial judge, and his ruling in the exercise of such discretion, unless abuse of that discretion appears, is not subject to review on appeal. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

The trial court's findings of fact are deemed to be supported by competent evidence and are conclusive on appeal where defendant does not bring forth in the record any of the testimony or evidence in the case. Bethea v. Bethea, 43 N.C. App. 372, 258 S.E.2d 796 (1979), cert. denied, 299 N.C. 119, 261 S.E.2d 922 (1980).

Failure to Except to Findings of Fact. — When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Failure to object to disputed charge during the opportunity provided results in failure to properly preserve the assignment of error for appeal, as required by this rule. State v. Morris, — N.C. App. —, 300 S.E.2d 46 (1983).

Findings and Conclusions of Law May Be Challenged for First Time in Brief. — This rule provides that notwithstanding the absence of exceptions, an appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law. Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

Purpose of Section (d). — Section (d) of this rule introduces a new procedure designed to protect appellees who have been deprived in the trial court of an alternative basis in law upon which their favorable judgment might be supported and who face the possibility that on appeal prejudicial error will be found in the ground upon which their judgment was actually based. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982).

Failure to object to the introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. State v. Lucas, 302 N.C. 342, 275 S.E.2d 433 (1981).

An objection to testimony not taken in apt time is waived. State v. Hensley, 29 N.C. App. 8, 222 S.E.2d 716, cert. denied, 290 N.C. 95, 225 S.E.2d 325 (1976).

Exceptions to improper remarks of counsel during argument to the jury, like those to the admission of incompetent evidence, must be made in apt time or else be lost. State v. Alford, 289 N.C. 372, 222 S.E.2d-222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

While, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission not assignable as error, this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. State v. Isom, 52 N.C. App. 331, 278 S.E.2d 327, cert. denied, 303 N.C. 548, 281 S.E.2d 398 (1981).

Except where the error complained of is so prejudicial that even upon timely objection no purported curative instruction could possibly remove the prejudicial effect, counsel's failure to make timely objection will not waive defendant's right to object under subdivision (b). State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Or Where Questions of Jurisdiction or Sufficiency of Criminal Charge Are Raised. — Under this rule, upon appeal, any party may present for review, by properly raising the issue in the brief, the questions of whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law. This is true, notwithstanding the absence of exceptions or assignments of error in the record on appeal. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Under section (a) any party may present for review, by properly raising the issue in his brief, the questions of whether the court had jurisdiction of the subject matter and whether a criminal charge is sufficient in law. This rule applies even when no motion is made to quash. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

A broadside exception presents these questions only: (1) Do the facts found support the judgment, and (2) does error of law appear on the face of the record. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

A broadside exception does not bring up for review the sufficiency of the evidence to support any particular finding of fact. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Listing of Exceptions. — This rule requires that all assignments of error should be followed by a listing of the exceptions on which they are based, and that these exceptions should be identified by the pages of the record at which they appear; exceptions not listed properly should be deemed abandoned. Peoples Serv. Drug Stores, Inc. v. Mayfair, 50 N.C. App. 442, 274 S.E.2d 365 (1981).

Capital Cases. — In every case where a death sentence has been pronounced, it is the practice of the Supreme Court to carefully review the entire record to determine if prejudicial error appears. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

The general rule that exceptions to improper remarks of counsel during argument must be taken before verdict has been modified so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Alford, 289 N.C. 372, 222 S.E.2d 222, vacated in part on other grounds sub nom. Carter v. North Carolina, 429 U.S. 809, 97 S. Ct. 46, 50 L.Ed.2d 69 (1976).

If after careful review of the entire record in capital cases error does appear, even though not assigned by defendant, the Supreme Court will take cognizance of the error ex mero motu. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

If, upon an examination of the record for the ascertainment of reversible error in capital cases, error is found, it then becomes the duty of the Supreme Court upon its own motion to recognize and act upon the error so found. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

Preservation of Jury Instruction Objections for Review Prior to 1981 Amendment. — See Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004, 101 S. Ct. 545, 66 L. Ed. 2d 301 (1980), rehearing denied, 449 U.S. 1119, 101 S. Ct. 932, 66 L. Ed. 2d 848 (1981).

The necessity for identifying the instruction objected to has long been the established practice in North Carolina. The new rules merely clarify the requirement. State v. Snyder, 31 N.C. App. 745, 230 S.E.2d 599, cert. denied, 292 N.C. 268, 233 S.E.2d 395 (1977).

And Substance of Inadequacy Must Be Supplied. — Section (b)(2) of this rule means that when an appellant excepts to the inadequacy of the court's instruction on a particular point, in contrast to the court's failure to give any charge on the subject, appellant must set out the substance of the inadequacy, that is, substantially supply the omission which he contends rendered the charge insufficient. State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978).

Where the charge to the jury is not included in the record on appeal, it is presumed that the jury was properly instructed as to the law arising upon the evidence as required by statute. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the court imports verity and the court is bound by it. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

Record for Review of Sustained Objection. — When an objection to a specific question asked on cross-examination is sustained, the answer the witness would have given must be made part of the record or the propriety of the objection will not be considered on appeal. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980); State v. Wilhite, 59 N.C. App. 654, 294 S.E.2d 396, appeal dismissed & cert. denied, 307 N.C. 129, 297 S.E.2d 403 (1982).

Failure to Except Precludes Review. — The general rule is that where no objection or exception is made at trial to the allegedly improperly admitted evidence, the appellant may not challenge the item for the first time on appeal. State v. Jordan, 49 N.C. App. 560, 272 S.E.2d 405 (1980).

The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal and the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. State v. Smith, 50 N.C. App. 188, 272 S.E.2d 621 (1980).

In an action for breach of contract, plaintiff waived its objection to the trial court's framing of an issue submitted to the jury since plaintiff did not object to that issue at trial nor did it request a different issue. Burke County Pub. Schools Bd. of Educ. v. Juno Constr. Corp., 50 N.C. App. 238, 273 S.E.2d 504 (1981).

In plaintiff's action for divorce from bed and board on the ground that defendant had rendered such indignities as to make her life burdensome, defendant could not complain on appeal that the issue of plaintiff's indignities offered to defendant should have been submitted to the jury, since defendant never demanded submission of the issue at trial. Vandiver v. Vandiver, 50 N.C. App. 319, 274 S.E.2d 243 (1981).

Failure to Except Forecloses State Appeal and Federal Habeas Corpus. — Petitioner's failure to comply with valid state procedural requirements, in that he failed to except to the "presumption of malice" instruction and the alleged burden-shifting instructions in his assignments of error as required by this rule, and failed to otherwise raise the issue in his appeal, foreclosed both direct and collateral attack in the North Carolina courts, and was an adequate and separate state ground for denying federal habeas corpus relief on those claims. Watson v. North Carolina, 509 F. Supp. 850 (E.D.N.C. 1981).

In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule, see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), was applicable in this case in which the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Applied in State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); Dawson Indus., Inc. v. Godley Constr. Co., 29 N.C. App. 270, 224 S.E.2d 266 (1976); Foy v. Bremson, 30 N.C. App. 662, 228 S.E.2d 88 (1976); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976); Sturdivant v. Sturdivant, 31 N.C. App. 341, 229 S.E.2d 318 (1976); In re Adoption of Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); Borg-Warner Acceptance Corp. v. David, 32 N.C. App. 559, 232 S.E.2d 867 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977); Productive Tool Corp. v. Pilot Freight Carriers, Inc., 33 N.C. App. 241, 234 S.E.2d 758 (1977); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977); Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977); State v. Graham, 35 N.C. App. 700, 242 S.E.2d 512 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Abernathy, 36 N.C. App. 527, 244 S.E.2d 696 (1978); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); State v. Gibbs, 297 N.C. 410, 255 S.E.2d 168 (1979); State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); North Carolina Nat'l Bank v. Goode, 298 N.C. 485, 259 S.E.2d 288 (1979); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 41 N.C. App. 310, 255 S.E.2d 557 (1979); Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979); Gilmore v. Gilmore, 42 N.C. App. 560, 257 S.E.2d 116 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); State v. Smith, 43 N.C. App. 727, 259 S.E.2d 805 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); State v. Benton, 299 N.C. 16, 260 S.E.2d 917 (1980); State v. Matthews, 299 N.C. 284, 261 S.E.2d 872 (1980); North Carolina State Bar v. Combs, 44 N.C. App. 447, 261 S.E.2d 207 (1980); Robinhood Trails Neighbors v. Winston-Salem Zoning Bd. of Adjustment, 44 N.C. App. 539, 261 S.E.2d 520 (1980); Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980); Hazard v. Hazard, 46 N.C. App. 280, 264 S.E.2d 908 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App. 488, 265 S.E.2d 647 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); State v. Trueblood, 46 N.C. App. 545, 265 S.E.2d 664 (1980); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980); DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980); Thompson v. Lenoir Transf. Co., 48 N.C. App. 47, 268 S.E.2d 534 (1980); Rice v. Peters, 48 N.C. App. 697, 269 S.E.2d 740 (1980); Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980); State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981); In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981); State v. McCoy, 303 N.C. 1, 277 S.E.2d 515 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs.,

Inc., 305 N.C. 633, 291 S.E.2d 137 (1982); State v. Andrews, 306 N.C. 144, 291 S.E.2d 581 (1982); State v. Harris, 306 N.C. 724, 295 S.E.2d 391 (1982); State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982); State v. Woods, 307 N.C. 213, 297 S.E.2d 574 (1982); State v. Mackey, 56 N.C. App. 468, 291 S.E.2d 663 (1982); State v. Best, 59 N.C. App. 96, 295 S.E.2d 774 (1982); State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296 S.E.2d 804 (1982); Crump v. Coffey, 59 N.C. App. 553, 297 S.E.2d 131 (1982); Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982); State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982); State v. Godwin, 59 N.C. App. 662, 297 S.E.2d 623 (1982); State v. Cheek, — N.C. —, 299 S.E.2d 633 (1983); State v. Myrick, — N.C. App. —, 299 S.E.2d 439 (1983); West v. Slick, — N.C. App. —, 299 S.E.2d 657 (1983); State v. Owens, — N.C. App. —, 300 S.E.2d 581 (1983); State v. Capps, — N.C. App. —, 300 S.E.2d 819 (1983); State v. Setzer, — N.C. App. —, 301 S.E.2d 107 (1983); State v. Thompson, — N.C. App. —, 302 S.E.2d 310 (1983); Four Seasons Homeowners Ass'n v. Sellers, — N.C. App. —, 302 S.E.2d 848 (1983); State v. Sanderson, — N.C. App. —, 302 S.E.2d 899 (1983).

Quoted in Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977); Sellers v. City of Asheville, 33 N.C. App. 544, 236 S.E.2d 283 (1977); Cole v. Stevenson, 447 F. Supp. 1268 (E.D.N.C. 1978); Norwood v. Sherwin-Williams Co., 303 N.C. 462, 279 S.E.2d 559 (1981); Caudle v. Ray, 50 N.C. App. 641, 274 S.E.2d 880 (1981); State v. Rinck, 303 N.C. 551, 280 S.E.2d 912 (1981); State v. Patton, 57 N.C. App. 702, 292 S.E.2d 172 (1982); State v. Haskins, 60 N.C. App. 199, 298 S.E.2d 188 (1982); Wright v. Fiber Indus., Inc., — N.C. App. —, 299 S.E.2d 284 (1983).

Stated in State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804 (1980); Oroweat Employees Credit Union v. Stroupe, 48 N.C. App. 338, 269 S.E.2d 211 (1980); State v. Hunter, 48 N.C. App. 689, 269 S.E.2d 736 (1980); State v. Stafford, 48 N.C. App. 740, 269 S.E.2d 739 (1980); S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980); State v. Melton, 52 N.C. App. 305, 278 S.E.2d 309 (1981); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981).

Cited in State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); Patterson v. Weatherspoon, 29 N.C. App. 711, 225 S.E.2d 634 (1976); Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977); Benton v. W.H. Weaver Constr. Co., 34 N.C. App. 421, 238 S.E.2d 655 (1977); State v. Hice, 34 N.C. App. 468, 238 S.E.2d 619 (1977); Tadlock v. C.L. Snipes Motors, Inc., 34 N.C. App. 557, 239 S.E.2d 311 (1977); State v. Truesdale, 34 N.C. App. 579, 239 S.E.2d 286 (1977); State v. Collins, 35 N.C. App. 250, 241 S.E.2d 98 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390 (1978); Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Jones v. Morris, 42 N.C. App. 10, 255 S.E.2d 619 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980); Harris v. Harris, 50 N.C. App. 305, 274 S.E.2d 489 (1981); Young v. Sams, 510 F. Supp. 141 (E.D.N.C. 1981); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897 (1981); Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191 (1981); Rheinbert-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); State v. LeDuc, 306 N.C. 62, 291 S.E.2d 607 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Perkins, 57 N.C. App. 516, 291 S.E.2d 865 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); Powell v. Shull, 58 N.C. App. 68, 293 S.E.2d 259 (1982); State v. Griffin, — N.C. —, 302 S.E.2d 447 (1983); State v. Courtright, — N.C. App. —, 298 S.E.2d 740 (1983); State v. Sanderson, — N.C. App. —, 300 S.E.2d 9 (1983); First Union Nat'l Bank v. Wilson, — N.C. App. —, 300 S.E.2d 19 (1983); State v. Morrow, — N.C. App. —, 300 S.E.2d 266 (1983); State v. Parker, — N.C. App. —, 300 S.E.2d 451 (1983); Carter v. Parsons, — N.C. App. —, 301 S.E.2d 405 (1983); Wall v. Stout, — N.C. App. —, 301 S.E.2d 467 (1983); State v. Barneycastle, — N.C. App. —, 301 S.E.2d 711 (1983); State v. Housand, — N.C. App. —, 302 S.E.2d 284 (1983); Ransom v. Blair, — N.C. App. —, 302 S.E.2d 306 (1983); North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983); Rumley v. Inman, — N.C. App. —, 302 S.E.2d 657 (1983); State v. Proctor, — N.C. App. —, 302 S.E.2d 812 (1983).

Rule 11

Settling the Record on Appeal; Certification

(a) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within 30 days after appeal is taken, file in the office of the clerk of superior court and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 15 days after service of the proposed record on appeal upon him an appellee may file in the office of the clerk of superior court and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 15 days after service upon him of appellant's proposed record on appeal, an appellee may file in the office of the clerk of superior court and serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of superior court, and served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of such a request the judge shall by written notice to counsel for all parties set a place and a time not later than 15 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the judge shall settle the record on appeal by order.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The exceptions and assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the proce-

dure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification. The clerk of superior court shall forthwith inspect the items presented and, if they be found true copies and transcriptions, certify them, noting the date of certification on the appropriate docket.

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-282, 1-283, 1-284.

Commentary:

General. Using the change of terminology dictated by abandonment of the "record proper" — "case on appeal" function, see Commentary to Rule 9, this Rule carries forward the developed code process whereby the record on appeal is "settled" for filing in the appellate court — by party agreement, adversary approval through exchanges, or judicial order. The Rule also substantially alters the basic timetable for this process. See Table IV in the Committee's Table of Appendix and Forms. This new timetable attempts to accommodate to the realities of contemporary practice — most importantly, to the time required for securing a reporter's transcript — while nevertheless providing minimal basic times for the critical intervals. These basic intervals may of course then be altered in individual cases by extensions of time upon demonstrated necessity therefor. App. R. 27. This Rule leaves off the total process for perfecting an appeal at the time the record on appeal as settled is presented to the clerk of superior court for certification. The next step — filing the record in the appellate division — is picked up by Rule 12.

Subdivision (a) carries forward traditional practice (not heretofore expressly authorized in statute or rule) by which the parties may of course stipulate their agreement to the composition of a record on appeal. The time limit of 30 days expressed in this subdivision is tied to the basic 30-day period within which, by subdivision (b), an appellant must serve proposed record on appeal, or risk dismissal. These times must be related in order to keep the process moving. But the limit does not prevent later settlement by agreement. Obviously, even after adversarial exchange has begun, the parties should be free at any time to stipulate the record, and this is provided in subdivision (c).

Subdivision (b) describes the opening of the traditional adversarial exchange process, but on an altered basic timetable — 30 days for appellant to serve his proposed record (against 15 days under former G.S. § 1-282), and 15 days for appellee to respond (against 10 days under former G.S. § 1-282). The subdivision concludes on the hypothesis that within the time permitted *all* appellees have either affirmatively approved or failed to make proper objection to the appellant's proposed record, whereupon by force of the rule this becomes the record on appeal. The specification of approval by *all* appellees accommodates to the possibility that in a multiple-appellee situation less than all will so approve by either means. That possibility is dealt with in the next subdivision.

Subdivision (c) picks up the adversarial exchange process at the point where a sole appellee or any one or more of multiple appellees have, within the time permitted them, filed objections or proposed alternative records on appeal (formerly "counter case" per G.S. § 1-283). At this point, any one of three different situations may exist: 1) there is a single appellee in the case; 2) there are multiple appellees, only one of whom files objections or a proposed alternative record; 3) there are multiple appellees, more than one of whom file objections or proposed alternative records. Former statutes dealt only with situation 1); this Rule deals with all three. 1) In the single-appellee situation, failure by the appellant to make timely request for judicial settlement results in settlement in accordance with the appellee's objections or proposed alternative record. Former G.S. § 1-283, which expressly dealt only with the single-appellee hypothesis, gave the same result. 2) Where only one of multiple appellees makes objection or serves proposed alternative record, the Rule permits request for judicial settlement either by appellant or by other appellees, failing which the record on appeal is settled in accordance with the one objecting appellee's objections or

proposed alternative record. 3) In the third situation, where more than one of multiple appellees timely object or serve proposed alternative records, again the Rule permits request for judicial settlement either by appellant or any other appellees. But if there is failure by all parties in this situation so to request settlement, an impasse is created which cannot be resolved by dictating settlement in accordance with a single set of objections or alternative record. Here there is inevitably inconsistency or conflict between multiple objections and proposed alternatives. The solution of the Rule is a forced one which imposes the penalty for failure to request settlement where it should be, on appellant. The appeal is deemed abandoned by him as to all appellees who did file objections or proposed alternative records. The appeal would stay alive against any approving or non-objecting appellees with the appellant's proposed record on appeal constituting the record. However, if within the time permitted any appellee in this situation requests settlement, the process continues to judicial settlement.

This subdivision also contains alterations in timetables controlling the actions described: 10 days to request settlement, measured from date within which last appellee might have filed objections (against 15 days from date of service of objections under former G.S. § 1-283); 15 days to hold settlement conference, measured from date judge receives request (against 20 days from receipt of request under former G.S. § 1-283).

Subdivision (d) picks up and elaborates upon a provision in former Sup. Ct. R. 19(2) for the composition of a single record on appeal in cases where there are multiple appellants. In any situation where there are both multiple appellants and multiple appellees, the process described in subdivision (c) would be picked up at the point where the multiple appellants had agreed (by whatever procedure) to a single proposed record on appeal, and had served this upon the several appellees.

Subdivision (e). Former G.S. § 1-284, reflecting the two-component record on appeal of code practice, laid upon the clerk of superior court the literal duty to assemble the two (record proper and case on appeal) as soon as the latter was submitted to him in "settled" form, and then to "transmit" the whole to the appellate court clerk duly certified. In this as in other aspects of the practice built around the record proper-case on appeal model, practice had long since moved around design, and the clerk's function had become a much more modest one — of merely certifying the whole "record on appeal" as presented to him. This subdivision conforms to the developed practice, by its terms so confirming the clerk's function, and leaving to the appellant the responsibility for taking the next step — filing the record on appeal in the appellate division in accordance with succeeding Rule 12.

Subdivision (f) is a reminder that all the times provided in this Rule may be extended for cause under the procedures set out in Rule 27.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

Time Schedule. — The time schedule set out in this rule is designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. State v. Gillespie, 31 N.C. App. 520, 230 S.E.2d 154 (1976), cert. denied, 291 N.C. 713, 232 S.E.2d 205 (1977); Ledwell v. County of Randolph, 31 N.C. App. 522, 229 S.E.2d 836 (1976).

The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension. State v. Motsinger, 31 N.C. App. 594, 230 S.E.2d 205 (1976), cert. denied, 291 N.C. 714, 232 S.E.2d 202 (1977); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976).

Record Must Be Settled before Certification. — The clear implication of subdivision (e) of this rule is that the record must be settled before certification. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

Court Must Have Certification of Settled Record. — The appellate court must be assured that it has before it the certification of the clerk to the settled record, not the certification of the clerk to a record presented by the

appellant. State v. Gilliam, 33 N.C. App. 490, 235 S.E.2d 421 (1977).

The action of the trial judge in settling the record is final and will not be reviewed on appeal. State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979).

Court of Appeals Determines Question of Compliance. — Upon appeal, the opinion of Court of Appeals, not the clerk of the superior court, determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and whether the record is certified by the clerk of the superior court within ten days after settlement as required by this rule. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Opposing Counsel of Record under § 122-58.24. — Under § 122-58.24, the staff attorney of the Attorney General who represents the State at a commitment hearing is the opposing counsel of record within the meaning of Rule 26 and should be served with the proposed record on appeal as required by Rule 11 where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of section (e) of this rule, or to comply with the mandate of Rule 12(a), works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Failure to Comply Restored Jurisdiction to Trial Court. — Where defendant properly gave notice of appeal on September 1, 1978, but between that date and November 28, 1978, when judgment was entered, a period of 88 days, he took no steps to perfect that appeal, i.e., contrary to the mandate of section (a) of this rule defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by Rule 27(c), defendant's failure to perfect his appeal constituted an abandonment which reinvested the trial court with jurisdiction to render further order in the cause. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

It is improper procedure for counsel to file three separate records on appeal from a trial at which the three cases were consolidated. Aside from the question of the unnecessary expenses, the filing of three separate records on appeal creates the undue burden on the appellate courts of having to read three when one would have sufficed. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385 (1976), cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

The filing of two records when there should have been but one and the inclusion in both records of matter which should not have been included has placed an unnecessary burden on this court and has imposed upon the State an expense which was not necessary for the protection of defendants' rights to full appellate review. State v. Bryson, 30 N.C. App. 71, 226 S.E.2d 392, cert. denied, 290 N.C. 664, 228 S.E.2d 455 (1976).

Counsel Taxed for Redundant Record. — By appealing the three cases consolidated below separately, counsel has prepared and caused to be printed two redundant records on appeal; these records on appeal constitute matter not necessary for an understanding of the errors assigned. There has been no showing of compelling circumstances to justify the filing of three records on appeal instead of one. Consequently, counsel will be personally taxed with costs. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

When the court has ordered consolidation of cases or charges for trial, counsel cannot, of his own enterprise, sever the cases or charges and appeal each separately in the absence of a showing of compelling circumstances. State v. McKenzie, 30 N.C. App. 64, 226 S.E.2d 385, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Applied in State v. Cottingham, 30 N.C. App. 67, 226 S.E.2d 387 (1976); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389 (1976); State v. Pevia, 30 N.C. App. 79, 226 S.E.2d 394 (1976); State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976); Hudson v. Hudson, 31 N.C. App. 547, 230 S.E.2d 188 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); Williams v. Dameron, 37 N.C. App. 491, 246 S.E.2d 586 (1978); State v. Oxendine, 43 N.C. App. 391, 258 S.E.2d 810 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980).

Cited in State v. Cumber, 32 N.C. App. 329, 232 S.E.2d 291 (1977); State v. Davis, 36 N.C. App. 648, 244 S.E.2d 480 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

Rule 12

Filing the Record: Docketing the Appeal: Copies of Record

(a) **Time for Filing Record on Appeal.** Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal.** Prior to or at the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal in forma pauperis as provided in G.S. §§ 1-288 or 15-181, the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed by him.

(c) **Copies of Record on Appeal.** The appellant need file but a single copy of the record on appeal. Upon filing, the appellant shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court. By stipulation filed with the record on appeal the parties may agree that specified portions of the record on appeal need not be reproduced in the copies prepared by the clerk.

In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 1-284, Ct. App. R. 3, 5.

Commentary:

Subdivision (a). The 150-day outer limit for filing a record on appeal in the appellate court conforms to the 150-day limit to which, under former rules, time might be extended by a trial tribunal for "docketing" appeal, former Ct. App. R. 5. The basic time intervals provided by App. R. 11 for perfecting appeal total 90 days to filing in the appellate division (as contrasted with 60 days under former statutes G.S. §§ 1-282, 1-283), thus giving a leeway of 60 days. The 150-day limit may itself be extended on motion, but only by the appropriate *appellate* court. App. R. 27 (c). As indicated in the commentary to App. R. 11, these time limits are intended to accommodate realistically to minimal constraints of contemporary practice.

Subdivision (b). This subdivision differentiates "filing" the record on appeal (a responsibility and function of the appellant) and "docketing" the appeal (a function of the clerk of appellate court). "Docketing" is the critical reference point in time for continuing the timetable for processing appeals (from this is measured the time for filing appellant's brief, App. R. 13), hence the requirement of this subdivision that the clerk give immediate notice to the parties of the date on which this ministerial act has been performed by him.

Subdivision (c). This subdivision continues the developed practice under which the responsibility for preparing printed "work-copies" of the formal record on appeal is routinely placed upon the appellate court clerk. (Cf. former Sup. Ct. Rules 22, 23, and 25, which in terms give an option for prior printing by the appellant.) Hence the provision that only a single copy need be filed. This subdivision also contains the important provision alluded to in the General Commentary to Rule 9 for a further paring down of the "work-copies" from the original record on appeal by stipulation of parties. Cf. former Sup. Ct. R. 22. The mode of reproducing "work-copies" is not specified in this subdivision, in order to accommodate possible alternatives to the mimeographing specified by former rules. This as well as the number of copies is simply left to administrative direction of the particular court to its clerk.

Editor's Note. — Section 15-181, referred to in this rule, was repealed by Session Laws 1977, c. 711, s. 33.

Legal Periodicals. — For a survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

Notice Provision Jurisdictional. — The provisions of this rule, requiring that no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken is jurisdictional and it imposes a limit on the aggrieved party's right to appeal. Only the appropriate appellate court can extend this 150-day time limit. State v. Ward, — N.C. App. —, 301 S.E.2d 507 (1983).

Counsel's failure to timely file the record on appeal amounted to inadequate assistance of counsel, and the loss of one's only direct appeal because of counsel's neglect constitutes a serious deprivation. Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Noncompliance Works Loss of Right of Appeal. — A failure by appellant to meet the requirements of Rule 11(e), or to comply with the mandate of section (a) of this rule, works a loss of the right of appeal. Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Appeal is dismissed where record on appeal was not filed in the appellate court within 150 days from the giving of notice of appeal. Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Applied in Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976); In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); Byrd v. Alexander, 32 N.C. App. 782, 233 S.E.2d 654 (1977); State v. Lesley, 33 N.C. App. 237, 234 S.E.2d 476 (1977); Indian Trace Co. v. Sanders, 33 N.C. App. 386, 235 S.E.2d 91 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); City of Hickory v. Catawba Valley Mach. Co., 38 N.C. App. 387, 248 S.E.2d 71 (1978); State v. Crouch, 41 N.C. App. 612, 255 S.E.2d 192 (1979); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); In re Farmer, 52 N.C. App. 97, 277 S.E.2d 880 (1981); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

Quoted in State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980).

Stated in Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980).

Cited in State v. McDiarmid, 36 N.C. App. 230, 243 S.E.2d 398 (1978); Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); State v. Johnson, 38 N.C. App. 111, 247 S.E.2d 286 (1978); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); Broughton v. Baker, 537 F. Supp. 274 (E.D.N.C. 1982).

Rule 13

Filing and Service of Briefs

(a) **Time for Filing and Service.** Within 20 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk, and serve copies thereof upon all other parties separately represented. Within 20 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief.

(b) **Copies Reproduced by Clerk.** A party need file but a single copy of his brief. At the time of filing the party shall pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(c) **Consequence of Failure to File and Serve Briefs.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources and parallels in former rules or statutes: Sup. Ct. Rules 25, 26, 27, 27½, 28, 29 (and Ct. App. counterparts).

Commentary:

General. This Rule deals directly only with the filing and service of briefs in appeals from the trial courts. It does not apply to intra-appellate division appeals under Article III, which contains its own provisions on the subject. Administrative agency appeals under Art. IV incorporate the provisions of this Rule by reference. This Rule does not deal with the form, function, and content of briefs, a matter which App. R. 28 controls.

Subdivision (a) is self-explanatory as to operation. Freed from the "district call" mode of hearing appeals, this rule simply continues the open-ended timetable for taking the various steps in the appellate process.

Subdivision (b) is self-explanatory. For general background, see the Commentary to App. R. 12(c).

Subdivision (c) carries forward in minor restatement certain provisions of former Sup. Ct. Rules 28 and 29.

Effect of Amendments. — The amendment effective Jan. 1, 1981, adopted Oct. 7, 1980, substituted "clerk of the appellate court has mailed the printed record to the parties" for "appeal is docketed in the appellate court" in subsection (a).

CASE NOTES

Applied in In re Revocation of License to Operate Motor Vehicle of Church, 29 N.C. App. 511, 224 S.E.2d 697 (1976).

Cited in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

ARTICLE III. REVIEW BY SUPREME COURT OF APPEALS ORIGINALLY DOCKETED IN COURT OF APPEALS: APPEALS OF RIGHT; DISCRETIONARY REVIEW

Rule 14

Appeals of Right from Court of Appeals to Supreme Court Under G.S. § 7A-30

(a) **Notice of Appeal; Filing and Service.** Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court and serving notice of appeal upon all other parties within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. The running of the time for filing and serving a notice of appeal is tolled as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for appeal thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days after the first notice of appeal was filed. A petition prepared in accordance with Rule 15(c) for discretionary review in the event the appeal is determined not to be of right may be filed with or contained in the notice of appeal.

(b) **Same; Content.**

(1) **Appeal Not Presenting Constitutional Question.** In an appeal which is not asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment of the Court of Appeals from which the appeal is taken and shall state the basis upon which it is asserted that appeal lies of right under G.S. § 7A-30.

(2) **Appeal Presenting Constitutional Question.** In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

(c) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Transmission; Docketing; Copies.** Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).

(d) **Briefs.**

(1) **Filing and Service; Copies.** Within 20 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based solely upon the existence of a substantial constitutional question the appellant shall file and serve a new brief within 20 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist. Within 20 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party shall pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(2) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve his brief within the time allowed, he may not be heard in oral argument except by permission of the court.

Drafting Committee Note

Sources or parallels in former rules or statutes: Supp. Rules 3, 5, 6, 7, 8.

Commentary:

General. This Rule 14 and succeeding Rule 15 cover in general all matters covered by former Supplementary Rules 1-13. This rule deals comprehensively with appeals of right under G.S. § 7A-30, and Rule 15 with discretionary appeals upon certification either prior to or following Court of Appeals' determination. Various rules in *General Provisions* Article VI apply to different aspects of the practice covered by these two rules: App. R. 25 (dismissal for failure to perfect appeal); App. R. 26 (filing and service); App. R. 27 (computation and extension of time); App. R. 28 (function and content of briefs); App. R. 29 (calendaring and call of appeals); App. R. 30 (oral argument); App. R. 31 (petition for rehearing); App. R. 37 (motion practice).

Subdivision (a) carries forward the time limit provided in former Supp. R. 3(a). The provisions for tolling by filing of a petition for rehearing and for tolling as to all other parties by filing a notice of appeal by any party are new. Reciprocally, a notice of appeal or petition for discretionary review waives the rehearing option. App. R. 31(f). Note changed language "issuance of mandate" rather than "certificate of the clerk," to conform to the language of App. R. 32.

Subdivision (b) carries forward in unchanged substance the provisions of former Supp. R. 3(b).

Note that the only requirement as to substantive content of the notice of appeal is for the jurisdictional basis (in fact and law) for the asserted right to have Supreme Court review. It is not necessary in the notice of appeal to specify the whole range of questions which the appellant is entitled to present and intends to present if the appeal is entertained as properly based jurisdictionally. This is the office of the new brief required by subdivision (d)(1) of this rule to be filed in the Supreme Court. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence the appeal of right . . . is based," but extends to all questions "properly presented in the new briefs." See, so holding independently of a direct rule provision, *State v. Colson,* 274 N.C. 297, at 305 (1968) (appeal properly grounded in substantial constitutional question entitles to review on any other questions properly presented); but cf. *State v. Horn,* 285 N.C. 82, at 84 (1974) (dictum apparently *contra;* but Court indicated consideration nevertheless of the non-constitutional questions). The Rules

herein cited, by clearly codifying the rule announced in *Colson*, remove any question on the point.

See, for an illustrative form of notice of appeal under this Rule, Committee Form 3.

Subdivision (c). The first sentence of subsection (1) carries forward unchanged in substance the provisions of former Supp. R. 5(a). The last sentence of this subsection is new and preserves to the Supreme Court the opportunity to enforce these Rules independently of any prior acceptance by the Court of Appeals of a record on appeal. Subsection (2) is designed to conform to developed clerical practice under the former Supplementary Rules, and makes the transmission and docketing of records on appeal within the appellate division purely a ministerial function of the respective clerks. Details of the manner of procurement or reproduction of copies of the record and of the number and recipients of distribution remain to administrative direction of the court.

Subdivision (d). Subsection (1) alters the timetable for filing and service provided by the former Supplementary Rules: from 10 days to 20 days from date of docketing the record for the appellate's brief; from 20 days after docketing of the record to 15 days after service of appellant's brief, for the appellee's brief. The provision for filing but single copies of briefs for reproduction of copies by the clerk conforms to the practice described in the Commentary to Rule 13(b) for filing briefs in appeals from the trial courts. While this subsection deals basically only with filing and service requirements, leaving function and content to App. R. 28, which covers that subject as to *all* briefs, there is the important requirement in this subsection that the briefs filed under this Rule 14 in the Supreme Court shall be *new*. This removes the option given by former Supp. R. 8 to file a brief which merely *supplements* the Court of Appeals brief. The reason for requiring new briefs in all cases is developed in detail in the Commentary to App. R. 28(d). That subdivision permits incorporation in whole or in part of all or portions of the *argument* section of the briefs filed in the Court of Appeals into the argument section of the *new* brief required by this subdivision.

Subsection (2) carries forward unchanged in substance a comparable provision in former Supp. RR. 28 and 29.

Effect of Amendments. — The amendment adopted Jan. 31, 1977, added the proviso to the first sentence of subdivision (d)(1).

The amendment effective Jan. 1, 1981, adopted Oct. 7, 1980, substituted "20 days" for "15 days" in the last sentence of the first paragraph of subsection (d)(1).

CASE NOTES

Applied in Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Beck v. Carolina Power & Light Co., 307 N.C. 267, 297 S.E.2d 397 (1982).

Stated in State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Bennett, 59 N.C. App. 418, 297 S.E.2d 138 (1982).

Rule 15

Discretionary Review on Certification by Supreme Court Under G.S. § 7A-31

(a) **Petition of Party.** Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any of the grounds specified in G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the Utilities Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under G.S. Chap. 15A, Art. 89.

(b) **Same; Filing and Service.** A petition for review prior to determination by the Court of Appeals shall be filed with the Clerk of the Supreme Court and served on all other parties within 15 days after the appeal is docketed in the Court of Appeals. A petition for review following determination by the Court of Appeals shall be similarly filed and served within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for review. If a timely petition for review is filed by a party, any other party may file a petition for review within 10 days after the first petition for review was filed.

(c) **Same; Content.** The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. § 7A-31 for discretionary review. The petition shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required; but supporting authorities may be set forth briefly in the petition.

(d) **Response.** A response to the petition may be filed by any other party within 10 days after service of the petition upon him. No supporting brief is required, but supporting authorities may be set forth briefly in the response.

(e) **Certification by Supreme Court; How Determined and Ordered.**

(1) **On Petition of a Party.** The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition and any response thereto and without oral argument.

(2) **On Initiative of the Court.** The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders: Filing and Service.** Any determination to certify for review and any determination not to certify made in response to petition will be recorded by the Supreme Court in a written order. The Clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the Clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the Clerk of the Supreme Court.

(f) **Record on Appeal.**

(1) **Composition.** The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies.** When an order of certification is filed with the Clerk of the Court of Appeals, he will forthwith transmit the original record on appeal to the Clerk of the Supreme Court. The Clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the Clerk may require a deposit of the petitioner, to cover the costs thereof.

(g) **Filing and Service of Briefs.**

(1) **Cases Certified Before Determination by Court of Appeals.** When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed his brief in the

Court of Appeals and served copies before the case is certified, the Clerk of the Court of Appeals shall forthwith transmit to the Clerk of the Supreme Court the original brief and any copies already reproduced by him for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed his brief in the Court of Appeals and served copies before the case is certified, he shall file his brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determinations.** When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within 20 days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within 20 days after a copy of appellant's brief is served upon him.

(3) **Copies.** A party need file or the Clerk of the Court of Appeals transmit, but a single copy of any brief required by this Rule 15 to be filed in the Supreme Court upon certification for discretionary review. The Clerk of the Supreme Court will thereupon procure from the Court of Appeals or will himself reproduce copies for distribution as directed by the Supreme Court. The Clerk may require a deposit of any party to cover the costs of reproducing copies of his brief.

In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the clerk two legible copies thereof reproduced by typewriter carbon or other means.

(4) **Failure to File or Serve.** If an appellant fails to file and serve his brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the court's own initiative. If an appellee fails to file and serve his brief within the time allowed by this Rule 15, he may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders.** An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by that Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined.** As used in this Rule 15, the terms *appellant* and *appellee* have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, *appellant* means a party who appealed from the trial tribunal; *appellee,* a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals upon the Court's own initiative, *appellant* means the party aggrieved by the determination of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification, the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 15.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. Rules 1, 2, 4, 5, 6, 7, 8, 11, 13.

Commentary:

General. For coverage of this rule in conjunction with that of App. R. 14, see General Commentary to the latter. Note that this Rule 15 deliberately avoids use of the term "certiorari" to describe the procedure by which under the jurisdictional statute, G.S. § 7A-31, the Supreme Court exercises its discretionary power to review cases originally docketed for review in the Court of Appeals. Instead, the terms "certification," "certify for review," "petition for discretionary review," are used to conform directly to the statutory language and the procedure therein described, and to distinguish this procedure from that for review by the extraordinary writ of certiorari, which is dealt with in App. R. 21.

Subdivision (a) lays the basis for the rule's coverage of both by-pass and post-determination review procedures.

Subdivision (b) carries forward the time limits for petition for discretionary review provided in former Supp. R. 1 (by-pass) and Supp. R. 2 (post-determination). For commentary on the provision for tolling by filing a petition for rehearing in the Court of Appeals and the reciprocal effect of waiver of rehearing by petition for discretionary review, see Commentary to App. R. 14(a).

Subdivision (c). The provision for accompanying a post-determination petition with a copy of the Court of Appeals' opinion is from former Supp. R. 5(b). The other provisions supplant and serve the function of those provisions of former Supp. Rules 1 and 2 which borrowed certiorari writ practice by reference to former Sup. Ct. R. 34.

Note that the rule requires only that the petition contain a statement of the jurisdictional basis (in fact and law) for the review being sought. It is *not* necessary in the petition to specify the whole range of questions which the petitioner is entitled to present and intends to present if the case is certified for review. That is the office of the new brief required by subdivision (g)(2) of this rule to be filed upon certification. By Rule 16(a) the scope of Supreme Court review is not limited to "those questions upon whose existence ... the discretionary review is based," but extends to all questions then "properly presented in the new briefs."

See, for an illustrative form of a petition for discretionary review under this Rule, Committee Form 4.

Subdivision (d). Former Supp. Rules 1 and 2 in effect borrowed the certiorari *writ* practice sketched in former Sup. Ct. R. 34 for the discretionary review practice which is the subject of this new Rule 15. One of the former rule's features was a provision for response by other parties to such a petition. This subdivision carries this forward by direct statement.

Subdivision (e). Subsections (1) and (2) state directly what was merely implicit in former Supplementary Rules, which did not speak directly to the decision process on petitions for discretionary review. Subsection (3) carries forward, unchanged in substance but with some elaboration, the provision of former Supp. Rules 6, 8, and 13.

Subdivision (f). Subsection (1), first sentence, carries forward, unchanged in substance, the provisions of former Supp. R. 5(a). The second sentence is new. See Commentary to comparable App. R. 14(c)(1).

Subsection (2) conforms to developed clerical practice not directly stated in former Supplementary Rules. See Commentary to App. R. 14(c)(2).

Subdivision (g). Subsection (1) carries forward, unchanged in substance, the provisions of former Supp. RR. 6 and 11 controlling the filing and service of briefs in "by-pass" review situations whether on party or court initiative.

Subsection (2) carries forward the essential provisions of former Supp. RR. 7 and 8 controlling the filing and service of briefs in cases involving review by the Supreme Court of Court of Appeals determinations, but with two significant alterations from former practice: 1) The timetable for filing and service is changed: as to the appellant's brief, from 10 days to 20 days after docketing in the Supreme Court (see App. R. 15(e)(3) for time when docketing occurs); as to the appellee's brief, from 20 days after docketing in the Supreme Court to 15 days after service of appellant's brief. 2) The option to file *supplementary* briefs is removed; filing of *new* briefs is required. See Commentary to App. R. 14(d)(1).

Subsection (3) covers the filing of briefs in both by-pass and post-determination review cases. In by-pass review situations the responsibility for filing in the Supreme Court will depend upon whether the party has already filed his brief in the Court of Appeals before the case is certified for review. App. R. 15(g)(1). In post-determination situations filing will always be by the party and will be of the *new* brief required by App. R. 15(g)(2). This subdivision (3) is simply saying that in whatever situation only one copy of that brief need be filed in the Supreme Court to satisfy the *filing* requirement.

Subsection (4) carries forward, unchanged in substance, a comparable provision in Supp. RR. 28 and 29.

Subdivision (h) carries forward the comparable provision in former Supp. R. 2, and is drawn ultimately from G.S. § 7A-31.

Subdivision (i). From former Supp. R. 4.

Effect of Amendments. — The amendment effective Jan. 1, 1981, adopted Oct. 7, 1980, substituted "20 days" for "15 days" in the last sentence of subsection (g)(2).

The amendment adopted Nov. 18, 1981, inserted "the North Carolina State Bar, the Property Tax Commission," near the middle of subsection (a) and substituted "G.S. Chap. 15A, Art. 89" for "G.S. Chap. 15, Art. 22" at the end of subsection (a).

CASE NOTES

Applied in Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Cited in Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981).

Rule 16

Scope of Review of Decisions of Court of Appeals

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Review is limited to consideration of the questions properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. No assignments or cross-assignments of error to the decision of the Court of Appeals are required as the basis for the presentation of questions for review by the Supreme Court. A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals. A party who was an appellee in the Court of Appeals and is an appellee in the Supreme Court may present any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals.

(b) **Appellant, Appellee Defined.** As used in this Rule 16, the terms *appellant* and *appellee* have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, *appellant* means the party aggrieved by the decision of the Court of Appeals; *appellee,* the opposing party. Provided, that in its order of certification the Supreme Court may designate either party *appellant* or *appellee* for purposes of proceeding under this Rule 16.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 2 (only first sentence of subdivision (a)).

Subdivision (a) is designed to give hitherto lacking detailed guidance to counsel in dealing with the special problems posed by second review in a two-tiered appellate court system. The first sentence is drawn directly from the last sentence of former Supp. R. 2, and expresses the critical feature of second review by the higher court: that it is the decision of the first reviewing court which is under direct review. The rest of the subdivision is new and lays down certain corollaries to this root principle. These take into account the following points: 1) that the parties may or may not have changed positions as appellant and appellee on the second review; 2) that, following App. RR. 10(d) and 28(c), questions may properly be presented for review at both levels by both appellants and appellees; 3) that the *potential* scope of review by the higher court is limited only by the questions properly presented on first review in the first reviewing court, and not by the scope or basis of the latter's decision. See *State v. Colson,* 274 N.C. 295 (1968); 4) that within this *potential* scope of second review, the *actual* scope should be limited to those precise questions chosen and identified by the parties in their briefs as those for review by the higher court. Other rules which operate in important conjunction with this Rule 16 are cross-referred to emphasize the interrelation: 1) App. Rules 14(d)(1) and 15(g)(2) both force the conscious choice of precise questions for higher court review by their requirements that in both appeals of right and in discretionary appeals, both parties shall file *new* briefs in the Supreme Court; 2) App. R. 28, dealing with the function and content of briefs, requires both parties to state the questions being presented for review by the court to which appeal is taken, and in subdivision (c) spells out the procedure by which appellees in the Court of Appeals may in their briefs present questions for review. See Commentary to App. Rules 10(d) and 28(c). Notice that neither party is required to make assignments of error or cross-assignments of error with respect to the Court of Appeals decision.

Subdivision (b), by its forced definition of terms, permits a single set of descriptives "appellant" and "appellee" to be used in designating the parties in discretionary review cases as well as appeals of right, and within the discretionary review category, to both party-initiative and court-initiative situations. It is drawn from former Sup. Ct. R. 4.

CASE NOTES

The potential scope of review by the Supreme Court is limited by the questions properly presented for first review in the Court of Appeals. The attempt to smuggle in new questions is not approved. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Review for Error of Law in Court of Appeals Only. — After there has been a determination by the Court of Appeals, review by the Supreme Court, whether by appeal of right or by discretionary review, is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before the Supreme Court for review. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Effect of Equally-Divided Court. — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980).

Applied in State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); State v. Cox, 303 N.C. 75, 277 S.E.2d 376 (1981).

Cited in Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981); Hansel v. Sherman Textiles, 304 N.C. 44, 283 S.E.2d 101 (1981).

Rule 17

Appeal Bond In Appeals Under G.S. §§ 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court, in civil cases the party who takes appeal shall, upon filing the record on appeal in the Supreme Court, file with the Clerk of that Court a written undertaking, with good and sufficient surety in the sum of $200, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

Drafting Committee Note

Sources and parallels in former rules and statutes: Supp. R. 18.

Commentary:

This rule simply carries forward, in slightly re-stated form, the provisions of former Supp. R. 18. It does state explicitly, in the second sentence of subdivision (b), what is only implied in the former Supplementary Rule — that upon certification for review of a Court of Appeals determination on initiative of the Supreme Court, no appeal bond is required. Notice that these provisions for securing costs in intra-Appellate Division appeals are independent of those of App. Rules 6 and 7 for securing the costs of initial appeal from the trial courts, except to the extent that security there given stands good on the by-pass appeal under subdivision (c).

Editor's Note. — The order which amended this rule and repealed Rule 7 provides:

"Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, 'In criminal cases no security for costs is required upon appeal to the appellate division.' Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

"The appellate courts, pursuant to Rules 12, 13, and 15, will continue to collect advance deposits fixed by the clerks to cover the costs of reproducing the record on appeal and briefs.

"Rather than renumber the Rules, the Court has determined to reserve Rule 7 for future use."

Effect of Amendments. — The amendment effective July 1, 1978, adopted June 19, 1978,

inserted "in civil cases" near the beginning of subsection (a) and inserted "civil" preceding "case" in the first sentence of subsection (b) and near the beginning of subsection (c).

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO THE COURT OF APPEALS

Rule 18

Taking Appeal; Record on Appeal — Composition and Settlement

(a) **General.** Appeals of right under G.S. § 7A-29 to the Court of Appeals from the Utilities Commission, the Industrial Commission, the Commissioner of Insurance, and the Disciplinary Hearing Commission of the North Carolina State Bar (hereinafter "agencies" or "agency") shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Rule 18, Rule 19, and Rule 20.

(b) **Time and Method for Taking Appeals.** The times and methods for taking appeals from the agencies shall be as provided respectively in G.S. § 62-90(a) for appeals from the Utilities Commission; G.S. § 97-86 for appeals from the Industrial Commission and G.S. § 58-9.5(1) and (2) for appeals from the Commissioner of Insurance.

The time and methods for taking appeals from the Disciplinary Hearing Commission of the North Carolina State Bar are: Either party to the proceeding, within 30 days after receipt of a copy of the order of the Commission, which is to be sent by registered or certified mail, may appeal from the decision of the Commission to the Court of Appeals for alleged errors of law under the same terms and conditions as govern appeals from the Superior Court to the Court of Appeals in ordinary civil actions.

In case of an appeal from the decision of the Commission to the Court of Appeals, the appeal shall operate as a supersedeas; and any discipline imposed by the Commission shall be stayed pending determination of the appeal.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any of the agencies shall contain: (i) an index of the contents of the record, which shall appear as the first page thereof; (ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a copy of stipulation of counsel showing the same; (iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination; (iv) a copy of any findings of fact and conclusions of law and of the order, award, decision, or other determination of the agency from which appeal was taken; (v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for understanding of all errors assigned; (vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for understanding of all errors assigned; (vii) copies of such other papers filed and transcripts of such other proceedings had before the agency or any of its individual commissioners, deputies, or divisions as are necessary for understanding of all errors assigned; (viii) a copy of the notice of

appeal from the agency, and of all appeal entries relative to the perfecting of appeal; and (ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled for certification and filing in the Court of Appeals by any of the following methods:

(1) **By Agreement.** Within 30 days after appeal is taken, the parties may by agreement entered in the record on appeal constitute a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant may, within 30 days after appeal is taken, file in the office of the agency and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 15 days after service of the proposed record on appeal upon him, an appellee may file in the main office of the agency and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference, Referee, or Agency Head; Failure to Request Settlement.** If any appellee timely files objections, amendments, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the Chairman of the Utilities Commission or the Commissioner of Insurance to convene a conference to attempt settlement of the record on appeal in appeals from their respective agencies, or the Chairman of the Industrial Commission to settle the record on appeal in appeals from that agency, or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar to settle the record on appeal in appeals from that agency. A copy of such request shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed any appellee makes request in the same manner.

Within 20 days after receipt of a request for agency-supervised conference in appeals from the Utilities Commission and the Commissioner of Insurance, the agency head shall convene a conference of all parties to the appeal by written notice. At the conference the agency head or his delegate shall attempt to accomplish a settlement of the record on appeal by agreement of the parties. If no such agreement is accomplished, the agency head shall forthwith request the Chief Judge of the Court of Appeals to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of the reference order.

Upon receipt of a request for settlement of the record on appeal the Chairman of the Industrial Commission or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar shall by written notice to counsel for all parties set a place and time not later than 20 days after receipt of the request for a hearing to settle the record on appeal. At the hearing the Chairman shall settle the record on appeal by order; provided,

however, that when the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar is a party to the appeal as permitted by Rule 19(d), settlement of the record on appeal, absent an agreement of the parties, shall be by a referee appointed pursuant to the procedures contained in the preceding paragraph.

(e) **Certification of Record on Appeal.** Within 10 days after the record on appeal has been settled by any of the procedures provided in Rule 18(d), the appellant shall present the items constituting the record on appeal to the agency head for certification. The agency head or his delegate shall forthwith inspect the items presented and if they be found true copies and transcriptions, so certify them, noting the date of certification on the appropriate docket of the agency.

(f) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 62-90(a) (Utilities Commission appeals); 97-86 (Industrial Commission appeals); 58-9.5(1) and (2) (Commissioner of Insurance appeals).

Commentary.

General. The statutes referred to in the sources and parallels noted above have provided details of the appellate procedure for appeals from the three state agencies indicated directly to the Court of Appeals. In conjunction with promulgation of these rules, those provisions have been stripped from the respective statutes by amendment, and are now incorporated in this Rule 18 as a practically comprehensive procedure for appeals from all three agencies. That procedure is uniform except in one respect, spelled out in subsection (3) of subdivision (d), concerning the mode of settlement of the record on appeal where the parties fail to agree. See the Commentary to that provision. The prescribed procedure substantially parallels, as did the statutory provisions, that provided for appeals from the trial courts. There are a few deviations, which are specifically identified in the Rule and App. R. 20 as matter retained in the governing statutes.

Subdivision (a) "borrows" in general the appellate procedure prescribed in these rules for appeals from the trial courts, except as that procedure is specifically spelled out in this Rule 18, or is retained in statutory prescriptions which are in turn identified in this and the succeeding two rules which make up this Article IV. This Rule 18 takes the procedure, including that left to statutory prescription, generally down to the point of certification of the record on appeal. At that point subdivision (f) specifically defers to the subsequent procedures provided in these rules for appeals from the trial courts.

Subdivision (b) defers to the retained statutory provisions because of their possible jurisdictional significance.

Subdivision (c) follows the format of App. R. 9(b) in specifying for agency appeals the items constituting the record on appeal. The items identified either duplicate or are appropriate analogues to comparable items specified for civil appeals.

Subdivision (d) parallels, practically identically, the procedure for settling records on appeal from the trial courts as specified in App. R. 11. There is one variation among the three agencies, which is dealt with in subsection (3): the mode of "judicial" settlement in the event of failure to settle by party agreement or exchange. Here, taking into account the possible involvement of the agency itself in appeals from the Utilities Commission and the Commissioner of Insurance, settlement is to be attempted first by an agency-supervised conference, and if this fails, by a referee appointed by the Chief Judge of the Court of Appeals. In Industrial Commission appeals, wherein the agency is not potentially a party in interest, settlement is to be by the agency head in the manner of the judge of a trial court. There is also a related variation in the timetable for settling records in agency appeals from that provided for trial court appeals: the agency head has 20 days rather than 15 days to call a settlement conference. Cf. App. R. 11(c).

Subdivision (e) parallels the comparable procedure for certification of trial court records. Cf. App. R. 11(e), substituting the agency head or his delegate as the certifying authority.

Subdivision (f) borrows all necessary further procedures — which would include those provided in App. R. 12 for filing the record on appeal and in App. R. 13 for filing and serving briefs — from the trial court appeal procedures.

While this subdivision does not specifically refer to them, the procedures laid down in the rules found in Art. VI, "General Provisions," governing such matters as filing and service, extensions of time, content of briefs, etc., are by their terms also applicable, as appropriate, to these agency appeals.

Effect of Amendments. — The amendment adopted June 21, 1977, added the Disciplinary Hearing Commission of the North Carolina State Bar to the list of agencies in subsection (a), added the second and third paragraphs of subsection (b), added the language beginning "or the Chairman of the Hearing Committee" at the end of the first sentence of the first paragraph of subdivision (d)(3) and inserted "or the Chairman of the Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar" near the beginning of the third paragraph of subdivision (d)(3).

The amendment effective Jan. 1, 1981, adopted Oct. 7, 1980, in the third paragraph of section (d)(3), deleted "a" preceding "time" in the first sentence and added the proviso to the end of the second sentence.

CASE NOTES

Applied in State v. Williams, 40 N.C. App. 178, 252 S.E.2d 245 (1979); State ex rel. Utilities Comm'n v. Bird Oil Co., 47 N.C. App. 1, 266 S.E.2d 838 (1980); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981).

Stated in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Rule 19

Parties to Appeal From Agencies

(a) **From Utilities Commission.** The complainant in the original complaint before the Commission, each of the other parties to the proceeding before the Commission, and the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.
(b) **From Industrial Commission.** The claimant before the Commission and the employer against whom claim is made and any other parties to the proceeding before the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.
(c) **From Commissioner of Insurance.** The complainant in the original complaint before the Commissioner, each of the other parties to the proceeding, and the Commissioner may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.
(d) **From the Disciplinary Hearing Commission of the North Carolina State Bar.** The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. § 62-90(a) (Utilities Commission); 97-86 (Industrial Commission); 58-9.5(1) and (2) (Commissioner of Insurance).
Commentary.

These provisions are simply borrowed from the statutes which have hitherto completely controlled appeals from these three agencies. They are included in these rules because of the rather unique alignments of parties in agency appeals, including the agencies themselves in Utilities Commission and Commissioner of

Insurance appeals. Cf. Commentary to App. R. 18(d).

Effect of Amendments. — The amendment adopted June 21, 1977, added subsection (d).

CASE NOTES

Disciplinary Hearing Commission. — Under the statutory method of disciplining attorneys "any party," including the attorney in question and the State bar, may appeal from a decision of the Disciplinary Hearing Commission. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Rule 20

Miscellaneous Provisions of Law Governing in Agency Appeals

Specific provisions of law pertaining to stays pending appeals from any agency to the Court of Appeals, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

Drafting Committee Note

Sources or parallels in former rules or statutes: None.

Commentary.

This rule is necessitated by the fact that as to the matters specified statutory procedures peculiar to the three agencies and differing from parallel procedures provided in these rules continue to control. This disclaimer of rule authority avoids any possible conflict. The matters specified are deemed to pertain so closely to legislative control of these quasi-judicial bodies, including their financing and the limits of the powers delegated to them by the legislature vis-a-vis those of the legislature and the courts (i.e. scope of judicial review, and permissible mandates of the reviewing court) that they must continue to be controlled by statute rather than appellate rule-making authority.

ARTICLE V. EXTRAORDINARY WRITS

Rule 21

Certiorari

(a) **Scope of the Writ.**

(1) **Review of the Judgments and Orders of Trial Tribunals.** The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals.** The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action; or for review of decisions of the Court of Appeals in cases appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar, the Property Tax Commission, or the Commissioner of Insurance.

(b) **Petition for Writ; to Which Appellate Court Addressed.** Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post Conviction Matters; to Which Appellate Court Addressed.** Petitions for writ of certiorari to review orders of the trial court denying motions for appropriate relief upon grounds listed in G.S. 15A-1415(b) by persons who have been sentenced to life imprisonment or death shall be filed in and determined by the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34.

Commentary.

General. This rule builds upon and attempts to clarify the certiorari writ practice provisions of former Sup. Ct. R. 34. As indicated in the General Commentary to App. R. 15 dealing with discretionary review by the Supreme Court under G.S. § 7A-31, that practice is by these Rules clearly differentiated in form and in terms from the extraordinary writ practice described in this Rule 21. The former Supplementary Rules in effect "borrowed" the Sup. Ct. R. 34 certiorari writ practice as the procedure by which determinations were made by the Supreme Court to "certify" Court of Appeals determination for discretionary review under G.S. § 7A-31. Former Supp. R. 2(a)(3). In these rules, App. R. 15 prescribes internally a "certification" practice for such cases; and this Rule 21 is confined in terms and in form to the traditional extraordinary writ function of classic certiorari as a means of review outside the regular appeal route.

Subdivision (a) establishes that certiorari may lie from either appellate court to permit review of trial tribunal judgments when ordinary appeal right has been lost or does not exist because of the interlocutory character of the

judgment. ("Trial tribunal" includes, per App. R. 1, the district and superior courts, and the three state agencies from which appeals lie to the Court of Appeals.) Further, that certiorari may lie from the Supreme Court to review Court of Appeals determinations when the right to regular appeal has been lost. Specification of which of the appellate courts may properly issue the writ to trial tribunals is left to subdivision (b). And the practice within either court is left to subdivision (c).

Subdivision (b) points to the correct appellate court to petition for the writ in any case. It is that court to which either party *might* have a right to appeal from any final judgment of the tribunal sought to be reviewed. This means that the petition must always be addressed to the Court of Appeals in any case before the three state agencies of Article IV, and in any case before the trial courts except a criminal case wherein a sentence of death or life imprisonment is possible or has been entered. In the latter case the petition must be addressed to the Supreme Court. In any case in the Court of Appeals wherein the writ may be sought, it must obviously by this Rule be sought in the Supreme Court. In cases where the writ is denied by the Court of Appeals, the petitioner must seek review of that determination under the general appeal provisions of App. R. 14 (of right) or App. R. 15 (discretionary review) as the case may dictate. Only if the right to seek regular review by either of these routes has been lost by failure to take timely action could a petitioner refused certiorari in the Court of Appeals seek review of that refusal by a second petition to the Supreme Court.

Subdivision (c), following traditional practice in the use of this discretionary writ, provides no specific time limit for filing the petition. The question of timeliness in a particular case is to be determined as a part of the general question of its propriety as an extraordinary mode of review. The other provisions of this subdivision elaborate upon the more sketchy descriptions of the practice contained in former Sup. Ct. R. 34.

Subdivision (d) carries forward in restated form, but unchanged in substance, the provisions of former Sup. Ct. R. 34.

See Committee Form 8, "Petition for Writ of Certiorari Under Rule 21", for an illustrative form.

Effect of Amendments. — The amendment adopted Nov. 18, 1981, rewrote subsection (a), dividing it into subdivisions (1) and (2) and adding the provision for review pursuant to G.S. 15A-1422(c)(3) in present subdivision (1) and the provision for review of decisions of the Court of Appeals in cases appealed from the Utilities Commission, the Industrial Commission, the State Bar, the Property Tax Commission or the Commissioner of Insurance in present subdivision (2), and added subsection (e).

CASE NOTES

Habeas Corpus Proceedings for Prisoners under Sentence of Death or Life Imprisonment. — By analogy, subdivision (b) of this Rule and § 7A-27(a), and repealed § 15-180.2 were logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Applied in State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510 (1981); Harding v. North Carolina, 683 F.2d 850 (4th Cir. 1982); State v. Walker, — N.C. —, 300 S.E.2d 553 (1983).

Quoted in Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

Stated in Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Cited in Black v. Clark, 36 N.C. App. 191, 243 S.E.2d 808 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Tate, 44 N.C. App. 567, 261 S.E.2d 506 (1980); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980); Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980); Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982); Smith v. American & Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982); State v. Crews, — N.C. —, 302 S.E.2d 457 (1983); Rudder v. Lawton, — N.C. App. —, 302 S.E.2d 487 (1983).

Rule 22

Mandamus and Prohibition

(a) **Petition for Writ; to Which Appellate Court Addressed.** Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Same; Filing and Service; Content.** The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court.** Within 10 days after service upon him of the petition the respondent or any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The Court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response and any supporting papers. No briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary:

General. Presumably because of the essentially liberal and flexible formula for determining appealability of interlocutory orders found in G.S. § 1-277, an extensive use of mandamus and prohibition to review such orders has not developed in our practice. Nevertheless, there are interlocutory orders from which appeal of right is held not to lie even under this formula. And in particular cases there may be need for immediate review of such orders to permit the affected party effectively to continue, such as discovery orders denying access to material deemed essential by the party. See, e.g., *Carolina Overall Corp. v. East Carolina Linen Supply, Inc.*, 1 N.C. App. 318 (1968) for such a possibility. Here mandamus and prohibition have traditionally provided an available means of review, particularly in systems such as the federal with fairly rigid "final judgment" constraints on appealability, and may be useful in our practice under such occasional circumstances as those above suggested. On occasion it would appear that certiorari has been used in circumstances where mandamus or prohibition would have been more appropriate (though they come eventually to the same thing, it must be admitted). See, e.g., *Brice v. Salvage Co.*, 249 N.C. 74 (1958).

The functions of mandamus and prohibition are similar and may well be interchangeable. (In jurisdictions where they have widespread usage it is common to petition for a "writ of mandamus or, alternatively, prohibition"). However, they have traditionally served different functions and are strictly appropriate for different situations. Mandamus lies most appropriately to compel a judicial action erroneously refused, or to correct judicial action erroneously taken, or to compel the exercise of judicial discretionary action when the taking of any action has been refused. Prohibition lies most appropriately to prohibit the impending

exercise of jurisdiction not possessed by the judge to whom issuance of the writ has been sought.

Mandamus by appellate writ under this rule is to be distinguished from that procedure (now abolished) by which under former G.S. §§ 1-511 et seq. a "civil action in the nature of mandamus" was available as an original proceeding in the superior courts to compel the performance of purely ministerial duty by a public official. That office is now performed by a straightforward civil action for injunctive relief against the official.

Subdivision (a). As indicated, the petition for mandamus and prohibition is technically against the judicial officer sought to be controlled in respect of judicial action taken or refused, and is in form an original proceeding against him. On the rare occasions that prohibition has been used in our practice, in recent times at least, it seems clear that this traditional form has not been observed. See, e.g., *State of N.C. ex rel. Payne v. Ramsey,* 262 N.C. 757 (1964). The main feature of the traditional form is the opportunity it provides for the affected judicial officer to participate directly. This feature may be important when the conduct drawn in question is alleged to contain elements of abuse of power, or to reflect a recurring pattern in similar cases. On most occasions, however, this will not be the case, and the judicial officer will simply leave the matter to be contested between the true parties in interest.

Subdivisions (b) and (c) set out the essentials of the writ practice, and conform generally to the traditional patterns of motion practice with or without direct participation of the judicial officer as technical respondent.

CASE NOTES

Applied in In re Greene, 297 N.C. 305, 255 S.E.2d 142 (1979).

Cited in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 291 N.C. 55, 229 S.E.2d 268 (1976).

Rule 23

Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders.**

(1) **Application — When Appropriate.** Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (i) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (ii) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Same — How and to Which Appellate Court Made.** Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except where an appeal from a superior court is initially docketed in the Supreme Court no petition will be entertained by the Supreme Court unless application has been first made to the Court of Appeals and by that court denied.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions.** Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by certiorari, mandamus, or prohibition has been filed

to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition: Filing and Service; Content.** The petition shall be filed with the clerk of the court to which application is being made, and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and by that court denied or vacated, or of facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus or prohibition.

(d) **Response; Determination by Court.** Within 10 days after service upon him of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, and any supporting papers. No briefs or oral arguments will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay.** Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by separate paper, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by separate paper, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 34(2).

Commentary.

General. This rule builds upon the bare reference to supersedeas writ practice found in former Sup. Ct. R. 34(1). It provides in these Rules the sole grounds and procedures by which an appellate court may stay enforcement or execution of the judgment of a trial tribunal pending the appellate court's review of that judgment by appeal or on application for certiorari, mandamus, or prohibition. Supersedeas by appellate court writ is a different procedure than that provided in App. R. 8 for stay by trial court order. The two rules are interrelated by appropriate cross-references.

Subdivision (a) deals only with supersedeas to stay enforcement of trial tribunal judgments. Supersedeas to stay Court of Appeals judgments is dealt with in following subdivision (b). This subdivision (a) lays down two conditions to seeking stay of enforcement of trial tribunal judgments: 1) the case must either be on appeal or the petitioner must be seeking review by one of the extraordinary writs. The procedure is thus ancillary and may not be undertaken except in conjunction with appellate review of the judgment in question; 2) there must have been a prior unsuccessful attempt to obtain or to hold an effective stay of the judgment in the trial tribunal. The procedures by which this may be attempted at that level are spelled out in App. R. 8. This latter condition may be avoided only upon an alternative one — that under the circumstances, seeking to obtain stay at the trial court level would simply be impracticable.

Subsection (2) directs the petition in all cases except death and life imprisonment cases to the Court of Appeals. Thus, a party may not appeal to the Court of Appeals and seek initially to obtain stay by supersedeas from the Supreme Court. Upon denial of the petition by the Court of Appeals, the petitioner could then turn to the Supreme Court with a petition for supersedeas

to that court (rather than seeking review of that denial by appeal or discretionary review in the Supreme Court).

Subdivision (b) deals with the much more rare practice for seeking supersedeas from the Supreme Court in respect of Court of Appeals' determinations. Here again, as in petitions for supersedeas directed to trial tribunal judgments, it is required that the petition be in conjunction with an attempt to obtain review of the judgment in question by the Supreme Court. But, unlike supersedeas running to trial tribunals, there is no requirement here that stay must first have been sought in the Court of Appeals.

Subdivision (c) expands upon the procedure provided in former Sup. Ct. R. 34(2). See Committee Form 9, "Petition for Writ of Supersedeas."

Subdivision (d) expands upon the procedure provided in former Sup. Ct. R. 34(2)(3).

Subdivision (e) had no counterpart in former rules. It provides for relief comparable to that of the t.r.o. in injunction practice, for stay pending the court's determination of the base petition. By the last sentence, this may in extreme cases be issued ex parte.

Effect of Amendments. — The amendment effective Jan. 1, 1981, adopted Dec. 2, 1980, substituted "a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition" for "an appeal of right has been taken, or a petition for discretionary review or" in the first sentence of subsection (b).

CASE NOTES

Quoted in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

Cited in North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Rule 24

Form of Papers: Copies

A party need file with the appellate court but a single copy of any paper required to be filed in connection with applications for extraordinary writs. The court may direct that additional copies be filed. The clerk will not reproduce copies.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This applies to the practice to obtain any of the writs authorized by App. Rules 21, 22, or 23.

ARTICLE VI. GENERAL PROVISIONS

Rule 25

Dismissal for Failure to Comply with Rules

If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed. Prior to the docketing of an appeal in an appellate court motions to dismiss are made to the court, commis-

sion, or commissioner from which appeal has been taken; after an appeal has been docketed in an appellate court motions to dismiss are made to that court. Motions to dismiss shall be supported by affidavits or certified copies of docket entries which show the failure to take timely action or otherwise to perfect the appeal, and shall be allowed unless compliance or a waiver thereof is shown on the record, or unless the appellee shall consent to action out of time, or unless the court for good cause shall permit the action to be taken out of time.

Motions made under this rule to courts of the trial divisions may be heard and determined by any judge of the particular court specified in Rule 36 of these rules; motions made under this rule to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner. The procedure in all motions made under this rule to trial tribunals shall be that provided for motion practice by the N.C. Rules of Civil Procedure; in all motions made under this rule to courts of the appellate division, shall be that provided by Rule 37 of these rules.

Drafting Committee Note

Sources and parallels in former rules and statutes: G.S. §§ 1-287.1; 1-287.1; Ct. App. Rules 5, 17, 18, 50.

Commentary. This rule states a blanket authority in the appropriate courts to dismiss cases on appeal for failure to take any timely action in the appellate process, from serving proposed case on appeal to filing the record on appeal. The consequence of failing thereafter to file briefs within permitted times is dealt with separately by App. Rules 13(c) (appeals from trial tribunals), 14(d)(2) (appeals of right from Court of Appeals) and 15(g)(3) (discretionary appeals from Court of Appeals). Former practice with respect to the proper court to entertain motions to dismiss is varied slightly in this rule. Under former Sup. Ct. R. 17 a motion to dismiss for failure to make timely filing of a record on appeal was made to the appellate court in conjunction with a motion to docket the appeal. This Rule 25 simply directs the motion for any failure to take timely action to the court wherein the case is then docketed. In the instance of a record not yet filed in the appellate court with time therefor elapsed, this now means the trial tribunal. The rule also makes plain that which is merely implied in former statutes and rules: that upon motion to dismiss the court may for good cause excuse an untimely action or nonaction and permit delayed action rather than dismissing. This replaces the more complicated procedure for "redocketing" or "reinstatement" upon such a showing which was provided by former Sup. Ct. RR. 17, 18. The provisions of App. R. 27(c) for extensions of time or for the taking of action after time expired are related in an obvious way to these provisions for dismissal upon initiative of the opposing party.

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

CASE NOTES

The court lacks discretion under this rule to permit the notice of appeal to be served after the expiration of 10 days following the entry of judgment. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Applied in Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); State v. Evans, 46 N.C. App. 327, 264 S.E.2d 766 (1980).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Rule 26

Filing and Service

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined on the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11″) with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982 may be included in records on appeal whether they are letter size or legal size (8½ x 14″). Papers shall be prepared on white paper of 16 — 20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the appendixes to these appellate rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post-office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

General. This rule deals comprehensively with the procedures for filing and serving papers in any context where these are required by these rules. The attempt in general is to conform to parallel requirements in the N. C. Rules of Civil Procedure governing filing and service of papers in the trial courts.

Subdivision (a). The key point here is the provision that although filing may be accomplished by mailing as well as by hand delivery to the appropriate clerk's office, its timeliness is measured in either case by the time of receipt in the clerk's office.

Subdivisions (b), (c), (d). Paralleling the provisions of N.C.R.Civ.P. 5, these subdivisions provide practical, expeditious modes of accomplishing and proving required service of papers. Of particular importance is the provision in subdivision (b) making service by mail complete upon due deposit in the mails, a provision which expedites the requirement in subdivision (b) that papers be served "at or before" filing. Of importance here is the provision of App. R. 27(b) which gives any person so served by mail an additional 3 days to take required action following service.

Subdivisions (e), (f). These subdivisions are other instances of the attempt to accommodate the rules to the case involving multiple parties, and are designed to expedite conformance with the party-service requirements in the situations described. Cf. N.C.R.Civ.P. 5(c). The specification "proceeding separately" accommodates to the alternative possibility that "numerous" parties may have voluntarily joined under App. R. 5, in which case by force of App. R. 26(e) service upon one automatically is service upon all.

Effect of Amendments. — The amendment effective July 1, 1982, added subsection (g).

The amendment adopted Feb. 11, 1982, and effective upon adoption added, at the end of subsection (c), "or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail."

The amendment adopted Dec. 7, 1982, and effective for all documents filed on or after March 1, 1983, deleted "All" from the beginning of the first sentence of the first paragraph of subsection (g) and substituted "to either appellate court" for "to the court" in that sentence, deleted the former second sentence of the first paragraph of subsection (g), which read "This rule shall become effective July 1, 1982, for all appeals arising from cases filed in the court of original jurisdiction after that date," added the second, third and fourth sentences of the first paragraph of subsection (g), and added the second and third paragraphs of subsection (g). The catchline for subsection (g) was also amended.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Requirements Jurisdictional. — The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of § 1-279, Rule 3 and this rule are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

When Papers Must Be Served. — This rule is interpreted as requiring that the papers referred to therein be served on all other parties to the appeal on the day of or before the day of filing; therefore, service of notice of appeal on plaintiff's counsel was timely where service was made by depositing the notice in the mail on the same day, though several hours later, that notice was filed with the clerk of court. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Notice of appeal must be served on opposing party either before the notice is filed or on the same day the notice is filed. Shaw v. Hudson, 49 N.C. App. 457, 271 S.E.2d 560 (1980).

Service on Appointed Special Advocate for State. — Where, at a mental health hearing session, the State was represented by an appointed special advocate, which special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate, he alone was the "attorney of record" within the meaning of this rule, and the proposed record on appeal should be served on him as special advocate rather than

the Attorney General. In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312, vacated on other grounds, 300 N.C. 747, 268 S.E.2d 221 (1980).

Cited in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

Rule 27

Computation and Extension of Time

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not a holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; by Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal prescribed by these rules or by law.

A motion to extend the time for filing the record on appeal to a time greater than 150 days from the taking of appeal may only be made to the appellate court to which appeal has been taken. All other motions for extensions of time are made to the trial tribunal from whose judgment, order, or other determination the appeal has been taken during the time prior to docketing of the appeal in the appellate division. No extension of time shall be granted by the trial tribunal which, if fully used, would preclude filing the appeal within 150 days from the taking of the appeal. If the appellate division extends the 150-day filing period, any subsequent motion for any extension of time shall be made to the appellate court where the case is to be docketed. Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or, if to a commissioner, then by that commissioner.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state; provided that motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard. Such motions may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a) and (b): None. Subd. (c): G.S. § 1-282, Ct. App. Rules 5, 17, 18, 50.

Commentary.

Subdivisions (a) and (b). These subdivisions parallel for appellate procedure the provisions of N.C.R.Civ.P. 6(a) and (e) for trial court procedures.

Subdivision (c). As in the corollary provisions of App. R. 25 governing the procedure for dismissals for untimely action or for nonaction, this subdivision lays down a blanket authority in the appropriate courts to extend any of the critical time intervals provided in these rules, with the important exception of the times for taking appeal. The general rule stated is that such motions are made to that court wherein the action is currently docketed. An important exception to this is the provision that the outer time limit of 150 days from taking appeal to file the record on appeal provided by App. Rule 13(a) may only be extended by the appellate court to which appeal has been taken. This parallels the provision formerly in Ct. App. R. 5 that the 90-day outer limit for "docketing" a record on appeal might be extended by the appellate court.

The final paragraph of this subdivision is new and authorizes extensions of time by the trial tribunals to be made ex parte, and without prior notice, but with the requirement of post-order notice to all parties of any extension granted. While this is a liberalization of former practice, it is thought justified, in view of the matter involved, to expedite action. App. R. 36, cross-referred as the source for identifying trial division judges empowered to grant extensions of time, also liberalizes the practice by opening this to a wider range of such judges than was formerly provided by now repealed G.S. § 1-282, which limited this to "the trial judge." Again, the idea is that given the matter involved, expedition of action is the most important consideration.

Effect of Amendments. — The amendment adopted March 7, 1978, added the third and fourth sentences of the second paragraph of subsection (c).

The amendment adopted October 4, 1978, effective January 1, 1979, added the proviso to the first sentence of the last paragraph of subsection (c).

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

The time for taking an appeal may not be enlarged by the appellate courts. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Appeal is dismissed where record on appeal was not filed in appellate court within 150 days from giving of notice of appeal. Appellant's motion for a new trial or a modification of the judgment pursuant to § 1A-1, Rule 59, the court's order fixing the time for service of the record on appeal, and the court's orders denying appellant's § 1A-1, Rule 59 motion did not extend the time within which the appellant was required to file the record on appeal after giving notice of appeal from the judgment. C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980).

Notice Provision Contained in Rule 12 is Jurisdictional. — The provisions of N.C. App. Pro., Rule 12, requiring that "no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken" is jurisdictional and it imposes a limit on the aggrieved party's right to appeal. Only the appropriate appellate court can extend this 150-day time limit. State v. Ward, — N.C. App. —, 301 S.E.2d 507 (1983).

Applied in Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976); State v. Brown, 42 N.C. App. 724, 257 S.E.2d 668 (1979); State v. Brown, 43 N.C. App. 532, 259 S.E.2d 309 (1979); Phillips v. Texfi Indus., Inc., 44 N.C. App. 66, 259 S.E.2d 769 (1979); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Piguerra v. Piguerra, 54 N.C. App. 188, 282 S.E.2d 567 (1981).

Stated in Galloway v. Stephenson, 510 F. Supp. 840 (M.D.N.C. 1981).

Cited in In re Allen, 31 N.C. App. 597, 230 S.E.2d 423 (1976); State v. Smith, 48 N.C. App. 402, 269 S.E.2d 262 (1980); State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); West v. Bladenboro Cotton Mills, Inc., — N.C. App. —, 302 S.E.2d 645 (1983).

Rule 28

Briefs; Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then presented and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate hearings, and in the following order:

(1) A statement of the questions presented for review.

(2) A concise statement of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking to the appeal before the court.

(3) A full statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the stenographic transcript, or the record on appeal, or both, as the case may be.

(4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, and if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief and if, because of length, a verbatim reproduction is not contained in the body of the brief itself, such verbatim portions of the transcript shall be attached as appendixes to the brief. Reference may then be made in the argument of the question presented to the relevant appendix. It is not intended that an appendix be compiled to show the general nature of evidence or the absence of evidence relating to a particular question presented in the brief.

(5) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

(6) A short conclusion stating the precise relief sought.

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain an argument and a conclusion in the form provided in Rule 28(b)(5) and (6) for an appellant's brief. It need contain no statement of the questions presented, statement of the case, statement of the facts, or appendixes, unless the appellee disagrees with the appellant's statements or appendixes, and desires to make a restatement, or suggest errors in or supplement the appellant's appendixes, or unless the appellee desires to present questions in addition to those stated by the appellant. If the appellee desires to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the stenographic transcript, or the record

on appeal, or both, as the case may be. If the stenographic transcript is used in lieu of narrating the testimony pursuant to Rule 9(c)(1), the appellee's brief must contain appendixes which set out verbatim those portions of the certified stenographic transcript which form the basis for and are necessary to understand the new questions presented by the appellee.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant. Within 20 days after service upon him of an appellee's brief presenting such questions, an appellant may file and serve upon all parties a reply brief limited to those additional questions presented in the appellee's brief.

(d) Repealed.

(e) **References in Briefs to the Record.** References in the briefs to exceptions and assignments of error shall be by their numbers and to the pages of the printed record on appeal at which they appear. Every reference to an assignment of error should include a reference to the particular exception(s) pertinent to the point for which the reference is made. Reference to parts of the printed record on appeal shall be to the pages where the parts appear. Where reference to the printed record on appeal is made in support of a contention that there was insufficient evidence to support a verdict, finding, or order, the reference may be to those pages within which all the evidence is set out.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs.** Except for a reply brief filed under subdivision (c) of this Rule 28, or unless the court upon its own initiative orders a reply brief to be filed and served, none will be received or considered by the court.

(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties, within 10 days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are

not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Drafting Committee Note

Sources and parallels in current statutes and rules: Sup. Ct. Rules 27, 27½, 28, 29.

Commentary.

General. This Rule defines the function and prescribes the form and content of *all* briefs, whether on appeals from the trial tribunals, or from the Court of Appeals to the Supreme Court. It does not deal with filing and service requirements. These appear in App. RR. 13 (appeals from trial tribunals), 14(d) (appeals of right from Court of Appeals) and 15(g) (discretionary review of Court of Appeals).

Subdivision (a). This statement of function builds upon well-established practice developed over the years. Its basic point is that the questions formally presented to the court in the briefs define the actual scope of review which has been earlier narrowed by the choice of exceptions to be brought forward in assignments of error. This serves to focus attention on the true function of assignments of error—that they serve primarily merely to alert the appellee to those portions of the record which will be relevant to consideration of the appellant's contentions on appeal. Since some of these may be abandoned, it is the questions presented in the briefs rather than the assignments of error which provide the court's direct source for consideration of error. In this light, the provisions of App. R. 10 which strip the assignment of error to a non-argumentative statement of the substance of the error suggested, with a mere reference to those exceptions set out in the body of the record upon which it is based, is justified. See Commentary to App. R. 10(c).

Subdivision (b) builds upon the more sparsely stated content requirements of former Sup. Ct. RR. 27, 27½, and 28. Subsection (2) attempts to formulate a clear standard of expectation as to the form and content of that element described as the "statement of the case." This element of the brief (confusedly denominated in many as the "statement of case on appeal") has been a frequent source of unhelpful prolixity and occasional abuse, as contested fact has been stated as established fact or in argumentative form. Against this tendency, the rule emphasizes a desire for conciseness, an outline of the essential nature of the case with its bare procedural history, and a nonargumentative statement of just so much undisputed factual background and context as will aid the court in its study of the briefs and records in light of the questions presented.

Subdivision (c). The most important provision in this subdivision is that which authorizes the formal presentation by appellees of questions for consideration by the court on a conditional basis. The conditional aspect is that in response to the appellant's brief the court will find error as assigned by the appellant. Two types of conditional questions are posited. The first must rest upon formal cross-assignment of error by the appellee, and this, per App. R. 10(d), may be based upon any error which is asserted by the appellee to have deprived him of an alternative basis for supporting his judgment. The other is already provided by N.C.R.Civ.P. 50(d) in its authorization for appellee presentation of the question (without any cross-assignment of error) whether a new trial should be awarded him as a matter of grace rather than giving judgment n.o.v. for the appellant where the court determines that the appellee's verdict is not supportable on the evidence. This provision is also important in its relationship to App. Rule 16 wherein the scope of Supreme Court review of Court of Appeals decisions is defined in terms of the questions properly raised by appellees as well as appellants in the Court of Appeals. The Commentary to that rule should be read in conjunction with this.

Subdivision (d). This in an important adjunct to the requirement in Rules 14(d)(1) and 15(g)(2) that *new* briefs be filed for Supreme Court review of Court of Appeals determinations. The compelling reason for that requirement is to force a reconsideration and possibly a restatement of the questions to be presented on this second review. See Commentary to App. R. 16. Even when a party desires to present exactly the same set of questions presented to the Court of Appeals, their restatement in the new brief will not be unduly burdensome. But restating the entire argument advanced in support of the party's position on these questions could well be. Hence this provision allows all or portions of the *argument* section in a Court of Appeals brief to be incorporated by reference in a new Supreme Court brief. This brief must nevertheless contain a reformulation or restatement of the other required elements: questions presented; statement of case (which has changed by whatever action the Court of Appeals has

taken); and relief sought (which will have changed most obviously if the parties are now reversed as appellant and appellee).

Subdivision (e) carries forward traditional practice for making references in the brief to particular items or portions of the record on appeal. The specification that reference is to be made to pages of the "printed" record refers to the "work copies" as prepared by the clerk pursuant to App. RR. 12(c), 13(b), 14(d)(1), 15(g)(3). These of course will bear different pagination than does the formal record on appeal filed by the appellant, and may indeed contain fewer items by stipulation of the parties under App. R. 12(c). This of course means that final references must await preparation by the clerk of these "printed" or "work" copies, but the time intervals between filing of the formal record and the deadline for filing briefs is adequate. App. R. 13(a).

Subdivision (f). If parties have formally joined on the appeal under App. R. 5, they will of course file joint briefs. This subdivision permits joinder on brief by parties not formally joined for all purposes on an appeal.

Subdivision (g) carries forward in slightly restated form a comparable provision in former Sup. Ct. R. 27.

Subdivision (h) had no counterpart in former rules, but expresses generally understood practice. The cross-reference is to that subdivision of this Rule which gives a right to an appellant to file a reply brief in any situation where an appellee has exercised the right to present "cross-questions," the reply brief being limited to these.

Subdivision (i) had no counterpart in former rules.

Commentary on 1981 Amendment. — The North Carolina Supreme Court, in repealing subsection (d), has eliminated the right to incorporate by reference any argument contained in a brief filed in the Court of Appeals. Not only must a party include in his new brief any question which he wants to preserve as required by Rule 28(b), but now he must also present any argument for that question upon which he intends to rely. Questions not brought forward and argued in the new brief will be considered abandoned.

These amendments to Rules 9 and 28 will provide litigants with an *alternative* to the provision of Rule 9(c)(1) which requires that generally the evidence must be set out in narrative form. This alternative pertains only to the testimony given at trial. Other items necessary to the appeals, e.g., pleadings, jury instructions, judgments, etc., should be contained in the record on appeal as required by appropriate appellate rules.

Effect of Amendments. — The amendment effective July 1, 1981, adopted Jan. 27, 1981, repealed section (d), which provided for incorporation by reference of the argument section of a brief filed in the Court of Appeals into the argument section of a new brief to be filed in the Supreme Court.

The amendment effective Oct. 1, 1981, adopted June 10, 1981, in section (b), deleted the third sentence of subsection (2), which read: "It should additionally contain a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review," redesignated former subsections (3) and (4) as present subsections (5) and (6), respectively, and added present subsections (3) and (4). In section (c), the amendment substituted references to subsections (5) and (6) of section (b) for references to subsections (3) and (4) in the first sentence, rewrote the second sentence, and added the present third and fourth sentences.

The amendment adopted Jan. 12, 1982, and effective for all appeals docketed after March 15, 1982, rewrote the first sentence and added the second and third sentences in subdivision (4) of subsection (b).

The amendment adopted Dec. 7, 1982, and effective Jan. 1, 1983, rewrote subsection (i).

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

CASE NOTES

Under this Rule, appellate review is limited to the arguments upon which the parties rely in their briefs. Crockett v. First Fed. Sav. & Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

The proviso to App. R. 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict and the judgment) but this proviso does not negate the requirement of this Rule that a question must be presented and argued in the brief in order to obtain appellate review of it. State v. Brothers, 33 N.C. App. 233, 234 S.E.2d 652, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981).

This rule requires that a question be presented and argued in the brief in order to obtain appellate review. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Questions raised by assignments of error but not presented in party's brief are deemed abandoned. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Under former Rule 28 (Rules of Practice in Court of Appeals), assignments of error not brought forward and argued in the brief are deemed abandoned. State v. Robinson, 26 N.C. App. 620, 216 S.E.2d 497 (1975).

On appeal, where defendant brings forward in his brief fewer arguments than there are assignments of error, the remaining assignments of error are deemed abandoned. State v. Ledford, 41 N.C. App. 213, 254 S.E.2d 780 (1979).

The Court of Appeals will not "fish out" an appellate's exceptions which are not referred to by the proper printed page number. Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979); S.J. Groves & Sons & Co. v. State, 50 N.C.App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

The State is not required by section (c) to state the facts unless there is some disagreement. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Incorporating Material By Reference. — For case construing former subsection (d), repealed in 1981, see State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Relief as Matter of Appellate Grace. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under § 7A-32(c) or pursuant to Appellate Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Failure to Cite Authority Abandons Argument. — Where the defendant properly included in its brief the assignments of error and exceptions to the findings of fact from the trial court but completely failed to afford the appellate court any citations of authority or the portions of the record upon which it relied to support its argument, its argument was deemed abandoned under section (b)(3) of this Rule. S.J. Groves & Sons & Co. v. State, 50 N.C. App. 1, 273 S.E.2d 465 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 353 (1981).

Failure to Relate Cases to Assignment of Error. — Where plaintiff, in his brief, has listed several cases but has made no attempt to relate the cases cited to his one assignment of error or to any argument advanced in support thereof, his brief is clearly not in accordance with this rule. Brown v. Boney, 41 N.C. App. 636, 255 S.E.2d 784, cert. denied, 298 N.C. 294, 259 S.E.2d 910 (1979).

Failure to refer to the assignments of error or exceptions following the statement of the questions presented could result in abandonment of all of appellant's questions on appeal and consequently result in dismissal of the appeal. State v. Shelton, 53 N.C. App. 632, 281 S.E.2d 684 (1981), appeal dismissed and cert. denied, 305 N.C. 306, 290 S.E.2d 707 (1982).

Codefendant Deemed to Have Abandoned Assignment. — Where codefendants object to the introduction of evidence, but the assignment of error based on this exception is brought forward and discussed in the brief of only one of the codefendants, the assignment is deemed abandoned by the other codefendants. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

An exception to the trial judge's signing of the judgment upon verdict of guilty raises nothing for review under this rule. State v. Womble, 292 N.C. 455, 233 S.E.2d 534 (1977).

It is the better practice for the appellee's brief to use the same numbering system for

the questions presented as the appellant's brief. State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977).

Question Not Raised at Trial or on Appeal May Not Be Attacked by Collateral Review. — Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979) (decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina).

Subdivision (b)(4) serves the same function that Rule 9(c)(1) serves with respect to records filed wherein the evidence is narrated; it assures that the court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. State v. Briley, 59 N.C. App. 335, 296 S.E.2d 501 (1982).

Subdivision (b)(4) Must Be Followed When Stenographic Transcript Used. — It is imperative that defendants using the stenographic transcript alternative allowed by Rule 9(c)(1) carefully follow the requirements of subdivision (b)(4) of this rule in order that appellate courts not be left the time-consuming and burdensome task of searching through the transcript for the pertinent pages. The omission of the pertinent transcript pages requires that the transcript be circulated among all the judges on the panel, requiring each of them to go through this time-consuming and burdensome task and is grounds for dismissal of the appeal. State v. Wilson, 58 N.C. App. 818, 294 S.E.2d 780 (1982).

Failure to observe the requirements of subdivision (b)(4) of this rule constitutes a substantial impediment to the capacity of the appellate court to perform its functions. State v. Edmonds, 59 N.C. App. 359, 296 S.E.2d 802 (1982), appeal dismissed & cert. denied, 307 N.C. 470, 299 S.E.2d 224 (1983); State v. Greene, 59 N.C. App. 360, 296 S.E.2d 802 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982).

Only Portions of Transcript Necessary to Determine Question Need Be Set Out. — Subdivision (b)(4) of this rule only requires setting out the verbatim portions of the transcript necessary for an understanding of each question presented. The rule does not require the appellant to include all of the evidence necessary for a determination of the questions presented. State v. Nickerson, — N.C. —, 302 S.E.2d 221 (1983).

Section (c) of Rule 9 provides for an alternative to narrating the evidence into the record; that is, the filing of a complete stenographic transcript with the clerk of the court in which the appeal is docketed. Whichever method is chosen (Rule 9 or 28), the result must be the same: to-wit, to provide the reviewing court with all the information necessary to understand each question presented. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

When Appendix Required. — An appendix is not contemplated for each question that requires a verbatim reproduction of a part of the transcript in order to understand that question. Instead, subdivision (b)(4) of this rule is designed to ensure that verbatim reproductions appear either in the brief itself or in an appendix to the brief. The appendix method should be employed when the question presented requires long verbatim reproductions of the transcript. Placing such reproductions in an appendix serves the dual purpose of providing the reviewing court with all the information necessary in order to make an informed determination while preserving the clarity and directness of the argument. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

This rule only requires the inclusion of the portions of the transcript necessary to understand, not decide, the question. Any other interpretation would require many appellants, especially those who question the sufficiency of the evidence, to include a verbatim copy of the entire transcript in the appendix to the brief. This interpretation should not encourage appellants to use less than due diligence in following the rules. Indeed, it is usually the safer and wiser course to do more than meet the minimum requirements. State v. Nickerson, — N.C. —, 302 S.E.2d 221 (1983).

Although a complete stenographic transcript contains all the evidence in a case, it is too time consuming and too burdensome a task to expect each member of the reviewing court to search through pages of the transcript in order to find those passages necessary to the understanding of each question presented. Therefore, it is imperative that whenever a stenographic transcript is used in lieu of narrating the evidence into the record, all relevant portions of the transcript must be reproduced in either the brief or its appendix. State v. Edmonds, — N.C. —, 302 S.E.2d 223 (1983).

Applied in State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Duncan, 290 N.C. 741, 228

S.E.2d 237 (1976); State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Riddick, 291 N.C. 399, 230 S.E.2d 506 (1976); State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976); In re Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977); Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206 (1977); State v. Musumeci, 33 N.C. App. 88, 234 S.E.2d 31 (1977); State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977); State v. Witherspoon, 293 N.C. 321, 237 S.E.2d 822 (1977); State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977); State v. Alston, 293 N.C. 553, 238 S.E.2d 505 (1977); State v. Lockett, 33 N.C. App. 401, 235 S.E.2d 73 (1977); State v. Tuttle, 33 N.C. App. 465, 235 S.E.2d 412 (1977); State v. Minshew, 33 N.C. App. 593, 235 S.E.2d 866 (1977); White v. Lawrence, 33 N.C. App. 631, 236 S.E.2d 30 (1977); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); State v. Looney, 294 N.C. 1, 240 S.E.2d 612 (1978); State v. Martin, 294 N.C. 253, 240 S.E.2d 415 (1978); Burkhimer v. Coble, 35 N.C. App. 127, 239 S.E.2d 852 (1978); State v. Warren, 35 N.C. App. 468, 241 S.E.2d 854 (1978); State v. Braxton, 294 N.C. 446, 242 S.E.2d 769 (1978); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); Smith v. State, 36 N.C. App. 307, 244 S.E.2d 161 (1978); State v. Burke, 36 N.C. App. 577, 244 S.E.2d 477 (1978); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978); Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978); State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583 (1978); Triplett v. Triplett, 37 N.C. App. 283, 245 S.E.2d 812 (1978); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152 (1978); Spencer v. Spencer, 37 N.C. App. 481, 246 S.E.2d 805 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979); State v. Henley, 296 N.C. 547, 251 S.E.2d 463 (1979); State v. Hopkins, 296 N.C. 673, 252 S.E.2d 755 (1979); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); King v. Demo, 40 N.C. App. 661, 253 S.E.2d 616 (1979); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223 (1979); State v. Hunt, 297 N.C. 258, 254 S.E.2d 591 (1979); Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Samuels, 298 N.C. 783, 260 S.E.2d 427 (1979); State v. Rogers, 43 N.C. App. 475, 259 S.E.2d 572 (1979); State v. Tatum, 44 N.C. App. 77, 259 S.E.2d 774 (1979); Econo-Travel Motor Hotel Corp. v. Foreman's Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Shirley v. Administrative Office of Courts, 44 N.C. App. 188, 260 S.E.2d 448 (1979); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Williams v. Williams, 299 N.C. 174, 261 S.E.2d 849 (1980); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); In re Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 474, 269 S.E.2d 595 (1980); State ex rel. Commissioner of Ins. v. North Carolina Rate Bureau, 300 N.C. 485, 269 S.E.2d 602 (1980); State v. Cohen, 301 N.C. 220, 270 S.E.2d 416 (1980); State v. Moore, 301 N.C. 262, 271 S.E.2d 242 (1980); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980); State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821 (1980); Spartan Equip. Co. v. Troitino & Brown, Inc., 46 N.C. App. 343, 264 S.E.2d 759 (1980); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); Hanes v. Kennon, 46 N.C. App. 597, 265 S.E.2d 488 (1980); Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980); Lloyd v. Carnation Co., 47 N.C. App. 203, 266 S.E.2d 722 (1980); Munford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980); Rose v. Herring Tractor & Truck Co., 47 N.C. App. 643, 267 S.E.2d 717 (1980); State v. Harper, 50 N.C. App. 198, 272 S.E.2d 600 (1980); State v. Berry, 51 N.C. App. 97, 275 S.E.2d 269 (1981); McNinch v. Henredon Indus., Inc., 51 N.C. App. 250, 276 S.E.2d 756 (1981); Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981); Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27 (1981); Brooks v. McWhirter Grading Co., 303 N.C. 573, 281 S.E.2d 24 (1981); State v. Poplin, 304 N.C. 185, 282 S.E.2d 420 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); Fisher v. E.I. Du Pont De Nemours, 54 N.C. App. 176, 282 S.E.2d 543 (1981); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Wachovia Bank & Trust Co. v. Rubish, 306 N.C. 417, 293 S.E.2d 749 (1982); State v. Thompson, 306 N.C. 526, 294 S.E.2d 314 (1982); State v. Weaver, 306 N.C. 629, 295 S.E.2d 375 (1982); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982); Anderson Chevrolet/Olds, Inc. v. Higgins, 57 N.C. App. 650, 292 S.E.2d 159 (1982); State v. Long, 58 N.C. App. 467, 294 S.E.2d 4 (1982); State v. Pearson, 59 N.C. App. 87, 295 S.E.2d 499 (1982); State v. Nickerson, 59 N.C. App. 236, 296 S.E.2d 298 (1982); Duke Power Co. v. Flinchem, 59 N.C. App. 349, 296

S.E.2d 804 (1982); State v. Joseph, 59 N.C. App. 436, 297 S.E.2d 173 (1982); State v. Craig, — N.C. —, 302 S.E.2d 740 (1983); Edwards v. Lathan, — N.C. App. —, 299 S.E.2d 819 (1983); State v. Willis, — N.C. App. —, 300 S.E.2d 829 (1983); State v. Gonzalez, — N.C. App. —, 302 S.E.2d 463 (1983).

Quoted in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Kessack, 32 N.C. App. 536, 232 S.E.2d 859 (1977); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Adcock v. Perry, 52 N.C. App. 724, 279 S.E.2d 871 (1981).

Stated in Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980); State v. Oliver, 52 N.C. App. 483, 279 S.E.2d 19 (1981); State v. Sutton, 53 N.C. App. 281, 280 S.E.2d 751 (1981); Harrington Mfg. Co. v. Logan Tontz Co., 53 N.C. App. 625, 281 S.E.2d 423 (1981); State v. Jacobs, 57 N.C. App. 537, 291 S.E.2d 804 (1982); State v. Dellinger, — N.C. —, 302 S.E.2d 194 (1983).

Cited in State v. Hunt, 289 N.C. 403, 222 S.E.2d 234 (1976); State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282 (1977); State v. Willard, 293 N.C. 394, 238 S.E.2d 509 (1977); State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977); State v. Greene, 34 N.C. App. 149, 237 S.E.2d 325 (1977); State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); Murphy v. Murphy, 34 N.C. App. 677, 239 S.E.2d 597 (1977); State v. Thomas, 35 N.C. App. 198, 241 S.E.2d 128 (1978); Bridger v. Mangum, 35 N.C. App. 569, 241 S.E.2d 726 (1978); North Carolina Auto. Rate Administrative Office v. Ingram, 35 N.C. App. 578, 242 S.E.2d 205 (1978); Lineberry v. Wilson, 36 N.C. 649, 244 S.E.2d 702 (1978); Bank of N.C. v. Cranfill, 37 N.C. App. 182, 245 S.E.2d 538 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); Triplett v. Triplett, 38 N.C. App. 364, 248 S.E.2d 69 (1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Rudolph, 39 N.C. App. 293, 250 S.E.2d 318 (1979); Reliance Ins. Co. v. North Carolina Nat'l Bank, 39 N.C. App. 420, 250 S.E.2d 699 (1979); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979); State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979); State v. Adams, 298 N.C. 802, 260 S.E.2d 431 (1979); Miller Grading & Constr. Co. v. Luckey, 44 N.C. App. 378, 260 S.E.2d 774 (1979); State v. Williams, 300 N.C. 190, 265 S.E.2d 215 (1980); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980); Wright v. Wright, 47 N.C. App. 367, 267 S.E.2d 61 (1980); Pacific Southbay Indus., Inc. v. Sure-Fire Distrib., Inc., 49 N.C. App. 172, 270 S.E.2d 515 (1980); State v. Jones, 50 N.C. App. 560, 274 S.E.2d 401 (1981); State v. Young, 302 N.C. 385, 275 S.E.2d 429 (1981); State v. Simpson, 303 N.C. 439, 279 S.E.2d 542 (1981); State v. Gamble, 50 N.C. App. 658, 274 S.E.2d 874 (1981); State v. Easter, 51 N.C. App. 190, 275 S.E.2d 861 (1981); State v. Daniels, 51 N.C. App. 294, 276 S.E.2d 738 (1981); Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766 (1981); State v. Wright, 52 N.C. App. 166, 278 S.E.2d 579 (1981); State v. Thomas, 52 N.C. App. 186, 278 S.E.2d 535 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); State v. Melvin, 53 N.C. App. 421, 281 S.E.2d 97 (1981); State v. Luckey, 54 N.C. App. 178, 282 S.E.2d 490 (1981); State v. Locklear, 54 N.C. App. 235, 282 S.E.2d 485 (1981); Coleman v. City of Winston-Salem, 57 N.C. App. 137, 291 S.E.2d 155 (1982); State v. Pinch, 306 N.C. 1, 292 S.E.2d 203 (1982); State v. Beaty, 306 N.C. 491, 293 S.E.2d 760 (1982); Davis v. Flynn, 57 N.C. App. 575, 291 S.E.2d 818 (1982); In re Huber, 57 N.C. App. 453, 291 S.E.2d 916 (1982); State v. Woodrup, 60 N.C. App. 203, 298 S.E.2d 439 (1983); In re Webb, — N.C. App. —, 299 S.E.2d 240 (1983); McManus v. Gambill, — N.C. App. —, 299 S.E.2d 479 (1983); Carter v. Parsons, — N.C. App. —, 301 S.E.2d 405 (1983); Spencer v. Spencer, — N.C. App. —, 301 S.E.2d 411 (1983).

Rule 29

Sessions of Courts; Calendar for Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Hearings in appeals will be held generally during the week beginning the Monday following the first Tuesday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.**

Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or of the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar. When a reply brief is allowed by rule or ordered by the Court, the appeal will be calendared or re-calendared for hearing at a time not less than 10 days after the time for filing the reply brief.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 1, 4, 5, 6, 7, 8, 9, 45; Ct. App. R. 1.

Commentary.

Subdivision (a) carries forward, with a minor modification to be noted, the provisions of former rules of both appellate courts regarding their respective terms and sittings.

Subsection (1) retains the Supreme Court's traditional Spring and Fall Terms of Court, from former Sup. Ct. R. 1. It abandons the stated hours for sitting during these terms which were provided in superseded Sup. Ct. R. 45. The last sentence substitutes for this scheduling procedure which does not specify particular hours of sitting.

Subsection (2) retains, from superseded Ct. App. R. 1, that Court's maintenance of a continuous term, with sittings of the panels for hearings being controlled by administrative action of the Chief Judge in accordance with published schedules.

Subdivision (b) consummates abandonment of the "district call" mode of calendaring cases for hearing in both appellate courts. As indicated, cases are now calendared without regard to their districts of origin, and generally instead on the basis of their order of docketing. The provision in the fourth sentence for a minimum of 30 days between filing of appellant's brief and the hearing of argument gives a leeway of at least 10 days between the filing of appellee's brief and the oral argument in appeals from the trial tribunals, App. R. 13(a); and a minimum of 15 days between the filing of appellee's brief and the time of oral argument in appeals from the Court of Appeals, App. RR. 14(d)(1), and 15(g)(2).

Effect of Amendments. — The amendment adopted March 3, 1982, and effective upon adoption rewrote subdivision (1) of subsection (a), which formerly provided for two terms of the Supreme Court each year.

Rule 30

Oral Argument

(a) **Order and Content of Argument.** The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(b) **Time Allowed for Argument.**

(1) **In General.** Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good

cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited. Counsel is not obliged to use all the time allowed, and the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel.** Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties.** If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs.** By agreement of the parties, a case may be submitted for decision on the written briefs; but the court may nevertheless order oral argument prior to deciding the case.

(e) **Decision of Appeal Without Publication of an Opinion.**

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion on every decided case. If the panel which hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

(2) Decisions without published opinion shall be reported only by listing the case and the decision in the Advance Sheets and the bound volumes of the Court of Appeals Reports.

(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

(f) **Pre-Argument Review; Decision of Appeal Without Oral Argument.**

(1) At anytime that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 10, 15, 30.

Commentary.

Subdivision (a). The first sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(1). The second sentence carries forward traditional practice as provided in former Sup. Ct. R. 30(2), in its requirement that appellant include a statement of the case in his opening argument. However, as appears in subdivision (b), this rule does not give him automatically an additional 10 minutes (over appellee's time) to devote to this. The last sentence of this subdivision (a) is new and its purpose is to encourage proper utilization of the

oral argument as a complementary, not merely repetitive, device to the argument in written brief.

Subdivision (b) builds upon the less detailed provisions of former Sup. Ct. R. 30(2), (3), and (4) which controlled the allocation of times for arguments. As indicated in the Commentary to subdivision (a) the basic times allocated by the rule are varied to cut back the appellant's time to parity of 30 minutes with that given appellee. If appellant considers that his duty to state the case justifies an extension in the particular case, he may request it. The specific identification of adverse interests between co-parties as a possible basis for extending the basic time of 30 minutes given to all of them simply recognizes that this is probably the most frequent basis upon which extensions may justly be sought. The penultimate sentence is drawn from former Sup. Ct. R. 30(4). The last sentence is new as a direct statement but has certainly been implicit in the practice under former rules.

Subsection (2) restates without substantive change the provisions of former Sup. Ct. R. 30(5).

Subdivision (c) supplants former Sup. Ct. R. 15 in dealing with the problem of non-appearance at oral argument. The former rule dealt more broadly with failures to "prosecute" in general, presumably including non-appearance at the hearing set for oral argument.

Subdivision (d) carries forward in restated form but without substantive change the provisions of former Sup. Ct. R. 10.

Commentary on 1981 amendment. — Rule 30(f) now provides that the Court of Appeals may dispense with oral arguments in certain cases. This amendment merely extends the rule to cases heard by the Supreme Court.

Effect of Amendments. — The amendment adopted May 3, 1976, added subsection (f).

The amendment adopted Dec. 18, 1975, added subsection (e).

The amendment adopted February 5, 1979, added subdivision (3) to subsection (e).

The amendment effective July 1, 1981, adopted June 10, 1981, in section (f), combined former subsections (1) and (2) as present subsection (2), and added present subsection (1).

CASE NOTES

Cited in In re Rogers, 44 N.C. App. 713, 262 S.E.2d 312 (1980); State v. McGraw, 306 N.C. 372, 293 S.E.2d 161 (1982).

Rule 31

Petition for Rehearing

(a) **Time for Filing: Content.** A petition for rehearing may be filed in a civil action within 20 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as the petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who, for periods of at least five years respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been of counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed.** A petition to the Supreme Court shall be addressed to the court. Two copies thereof shall be filed with the clerk.

A petition to the Court of Appeals shall be addressed to the court. Two copies shall be filed with the clerk.

(c) **How Determined.** Within 30 days after the petition is filed, the court will either grant or deny the petition. Determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party; and no oral argument by any party will be heard. Determination by the court is final. The rehearing may be granted as to all or less than all points suggested in the petition. When the petition is denied the clerk shall forthwith notify all parties.

(d) **Procedure When Granted.** Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted, and if the court has ordered oral argument, shall give notice of the time set therefor, which time shall be not less than 30 days from the date of such notice. The case will be reconsidered solely upon the record on appeal, the petition to rehear, and new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within 10 days after the clerk has given notice of the grant of the petition; and the opposing party's brief, within 20 days after petitioner's brief is served upon him. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13.

(e) **Stay of Execution.** When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided for stays pending appeal by Rule 8 of these rules.

(f) **Waiver by Appeal from Court of Appeals.** The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases.** The courts will not entertain petitions for rehearing in criminal actions.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 44.

Commentary.

General. Traditional practice in this relatively seldom invoked procedure has been fairly complex and burdensome, featuring the requirement that a petition to be considered at all must be supported by the certificates of two disinterested attorneys that each considers the court's decision in error, and the direction of the petition to specific (non-dissenting) members of the court rather than to the court itself, with these members then acting for the court in respect of the grant or denial of the petition. The first of these features is retained in this new rule; the latter is completely changed.

Subdivision (a) shortens the time for filing a petition from 40 days under former Sup. Ct. R. 44(1) to 20 days. It carries forward, in restated form but unchanged in substance, the provisions as to content and the attorney certificate requirement of former Sup. Ct. R. 44(2).

Subdivision (b) involves a complete change from the former practice by which the petition was addressed to specific members of the court who then determined for the court, and without further recourse to the court, whether the rehearing should be allowed. Under this subdivision (b) the petition is directed to the appropriate court. The manner in which the court will then determine whether to grant the rehearing is not spelled out and is left to administrative determination of the particular court.

Subdivision (c) accommodates to the new provision for court determination of the petition rather than specific member determination which is embodied in subdivision (b). The time for determination by the court after filing of the petition is the same 30 days provided in former Sup. Ct. R. 44(4) for determination by the court members to whom the petition was directed after it was delivered to them. The second sentence restates more explicitly the provisions in former Sup. Ct. R. 44(1), (5) for determination to grant or deny the petition solely on the basis

of the petition, without oral argument or response from the other party. The provisions for allowance as to less than all points prayed is carried forward in restated form from former Sup. Ct. R. 44.

Subdivision (d) carries forward, in restated form but unchanged in substance, the provisions of former Sup. Ct. R. 44(5) as to the matter to be considered by the court if rehearing is allowed, including the provision that oral argument will only be permitted by order of court. The provision for setting a time for oral argument if one is ordered is new. The times provided in the new rule for filing new briefs when rehearing is allowed is unchanged as to the petitioner (10 days from notice of grant) but changed as to the opposing party (from 20 days after grant of petition to 20 days after service upon him of petitioner's brief) from the provisions of former Sup. Ct. R. 44(5).

Subdivision (e) substantially changes the procedure for obtaining stay of execution of the trial court judgment upon filing of a petition for rehearing from that provided in former Sup. Ct. R. 44(7). Under the new rule, this is done at the trial court level pursuant to the provisions of App. R. 8, rather than by the Court members who under former Sup. Ct. R. 44 considered the petition.

Subdivision (f) is new, having no counterpart in former rules. It operates reciprocally with provisions of App. R. 14(a) and App. R. 15(b), which provide that the filing of a timely petition for rehearing tolls the running of the time to give notice of appeal or to petition for discretionary review from a Court of Appeals determination. The time for petitioning for rehearing is 20 days from issuance of mandate; that for giving notice of appeal or petitioning for discretionary review is 15 days from the same date. This means that if a party is to keep alive options for both rehearing and appellate review of Court of Appeals determinations, he must within the 15 days allowed to appeal or petition for discretionary review file a petition for rehearing. He loses any opportunity for possible rehearing if within the time given for appeal or discretionary review petition he takes either of the latter actions. His option to petition for rehearing, however, will continue to exist for 5 days after expiration of the time within which he might have appealed or petitioned for discretionary review if he failed or chose not to do either during that time.

CASE NOTES

Applied in Siders v. Gibbs, 31 N.C. App. 481, 229 S.E.2d 811 (1976).

Cited in State v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387 (1980); Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982).

Rule 32

Mandates of the Courts

(a) **In General.** Unless a court of the appellate division directs that a formal mandate shall issue, the mandate of the court consists of certified copies of its judgment and of its opinion and any direction of its clerk as to costs. The mandate is issued by its transmittal from the clerk of the issuing court to the clerk or comparable officer of the tribunal from which appeal was taken to the issuing court.

(b) **Time of Issuance.** Unless a court orders otherwise, its clerk shall issue the mandate of the court twenty days after the written opinion of the court has been filed with the clerk.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 38.

Commentary.

Subdivision (a) builds upon former Sup. Ct. R. 38, but with some alteration of the terminology traditionally employed to describe the formal action by which an appellate court's determination of an appeal is made operative. This action is most accurately described as being the issuance of the court's *mandate* to the court from which appeal was taken. The former rule, above cited, spoke of transmitting "certificates of the decisions" of the court or, alternatively, of ordering "an opinion certified down," and in general usage the court's action has

come to be referred to as "certifying decisions" or "opinions." But the court itself has employed the more accurate and comprehensive terminology when called upon to analyze and interpret the significance of the action in a particular situation. See, e.g., the opinion in *D & W, Inc. v. City of Charlotte,* 268 N.C. 720 (1966). This rule employs the terminology here suggested as the more accurate. The mandate *includes,* but is not solely a certified copy of the court's opinion or judgment. And in some cases, it may take the form of a direct order to the trial tribunal, as in *D & W v. City of Charlotte, supra;* or *Collins v. Simms,* 257 N.C. 1 (1962) (exact text of judgment mandated).

Subdivision (b). The time of issuance of a mandate has importance under these rules as the reference point for taking appeal of right from the Court of Appeals to the Supreme Court (App. R. 14(a)); for petitioning the Supreme Court to certify a Court of Appeals decision for discretionary review (App. R. 15(b)); and for petitioning either appellate court for rehearing (App. R. 44(a)). Accordingly it is important for counsel to be alerted to the ordinary course indicated in subdivision (b) by which issuance occurs 20 days after filing of the court's opinion with its clerk.

CASE NOTES

Quoted in West v. G.D. Reddick, Inc., 302 N.C. 201, 274 S.E.2d 221 (1981).

Rule 33

Attorneys

(a) **Appearances.** An attorney will not be recognized as appearing in any case unless he is entered as counsel of record therein. The signature of an attorney on a record on appeal, motion, brief, or other document permitted by these rules to be filed in a court of the appellate division constitutes entry of the attorney as counsel of record for the parties designated and a certification that he represents such parties. The signature of a member or associate in a firm's name constitutes entry of the firm as counsel of record for the parties designated. Counsel of record may not withdraw from a case except by leave of court. Only those counsel of record who have personally signed the brief prior to oral argument may be heard in oral argument.

(b) **Agreements.** Only those agreements of counsel which appear in the record on appeal or which are filed in the court where an appeal is docketed will be recognized by that court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. RR. 32, 33.

Commentary.

Subdivision (a) restates, in an attempt at clarification, the provisions of former Sup. Ct. R. 33.

Subdivision (b) restates, with only minor variation and no change of substance, the provisions of former Sup. Ct. R. 32.

Rule 34

Frivolous Appeals: Costs

If a court of the appellate division determines that an appeal has been taken frivolously and for purposes of delay, it may be dismissed at the cost of the appellant upon motion of the appellee or upon the court's own initiative.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 17(1).

Commentary.

This rule carries forward, in restated form but without change of substance, the provisions of former Sup. Ct. R. 17(1).

Rule 35

Costs

(a) **To Whom Allowed.** Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered by the court; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed in part, reversed in part, or modified in any way, costs shall be allowed as directed by the court.

(b) **Direction as to Costs in Mandate.** The clerk shall include in the mandate of the court an itemized statement of costs taxed in the appellate court and designate the party against whom taxed.

(c) **Costs of Appeal Taxable in Trial Tribunals.** Any costs of an appeal which are assessable in the trial tribunal shall upon receipt of the mandate be taxed as directed therein, and may be collected by execution of the trial tribunal.

(d) **Execution to Collect Costs in Appellate Courts.** Costs taxed in the courts of the appellate division may be made the subject of execution issuing from the court where taxed. Such execution may be directed by the clerk of the court to the proper officers of any county of the State; may be issued at any time after the mandate of the court has been issued; and may be made returnable on any day named. Any officer to whom such execution is directed is amenable to the penalties prescribed by law for failure to make due and proper return.

Drafting Committee Note

Sources and parallels in former rules and statutes: Subd. (a)-(c): None. Subd. (d): Sup. Ct. R. 43(2).

Commentary.

General. Former rules did not speak directly to standards or procedures by which the appellate courts should tax costs of appeal which by law were properly assessable by these courts. By statute, G.S. § 7A-11 (Supreme Court) and 7A-20(b) (Court of Appeals) both appellate courts have the authority to fix by rule the fees to be assessed against litigants for costs incurred in those courts. This is done by separate special rule outside the scope of these Rules.

Subdivision (a) lays down the basic standard by which, following traditional practice, those costs properly assessable by the appellate court are taxed to the losing party.

Subdivision (b) repeats a provision also included in App. R. 32(a) "Mandates of the Courts."

Subdivision (c) takes into account the fact that some costs of appeal are assessable in the trial court, and can only be assessed after the final determination on appeal of the losing party who is to bear them. See G.S. § 6-33, 7A-304(b), 7A-305(5).

Subdivision (d) builds on former Sup. Ct. R. 43(2) in providing for direct execution to collect costs taxed by the appellate courts.

CASE NOTES

Applied in City of Wilmington v. Camera's Eye, Inc., 43 N.C. App. 558, 259 S.E.2d 589 (1979).

Rule 36

Trial Judges Authorized to Enter Orders Under These Rules

(a) **When Particular Judge Not Specified by Rule.** When by these rules a trial court or a judge thereof is permitted or required to enter an order or to take some other judicial action with respect to a pending appeal and the rule does not specify the particular judge with authority to do so, the following judges of the respective courts have such authority with respect to causes docketed in their respective divisions:

(1) Superior court: the judge who entered the judgment, order, or other determination from which appeal was taken, and any regular or special judge resident in the district or assigned to hold courts in the district wherein the cause is docketed;

(2) District court: the judge who entered the judgment, order, or other determination from which appeal was taken; the chief district judge of the district wherein the cause is docketed; and any judge designated by such chief district judge to enter interlocutory orders under G.S. § 7A-192.

(b) **Upon Death, Incapacity, or Absence of Particular Judge Authorized.** When by these rules the authority to enter an order or to take other judicial action is limited to a particular judge and that judge is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the state, the Chief Justice will upon motion of any party designate another judge to act in the matter. Such designation will be by order entered ex parte, copies of which will be mailed forthwith by the Clerk of the Supreme Court to the judge designated and to all parties.

Drafting Committee Note

Sources and parallels in former rules and statutes: None.

Commentary.

Subdivision (a). The only judicial action which under these Rules must be taken by a "particular" judge is that of settling the record on appeal. Per G.S. § 1-283 and App. R. 11(c), only the judge from whose judgment appeal is taken may settle the record. All other judicial actions permitted to be taken by trial judges under these rules, including dismissals for failure to perfect appeals under App. R. 25, and extensions of time to take action under App. R. 27(c), come under the provisions of this subdivision. This involves a change from former practice which permitted only the "trial judge" to extend the time within which "case on appeal" (now "proposed record on appeal") might be served.

Subdivision (b) is complementary to newly re-written G.S. § 1-283 which provides for the continued authority of the only judge authorized to settle a record on appeal despite the expiration of his term after appeal has been taken from his judgment.

Rule 37

Motions in Appellate Courts

(a) **Time; Content of Motions; Response.** An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within 10 days after a motion is served upon him or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination.** Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties, and without awaiting a response thereto. A party who has not received actual notice of such a motion or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 36.

Commentary.

General. Motion practice in the appellate division is fairly limited. It extends to such matters as obtaining dismissals under App. R. 25; extensions of time under App. R. 27(c); peremptory settings for oral argument under App. R. 29(b); modification in the times allocated for oral argument under App. R. 30(b); additions or amendments to the record on appeal under App. R. 9(b)(6); and substitution of parties under App. R. 38. This Rule 37 builds upon and expands the rudimentary directions for motion practice found in former Sup. Ct. R. 36.

Subdivision (a) carries forward from former Sup. Ct. R. 36 the point that motions may be made down to the very time of oral argument, unless a specific time limit applies to the particular motion. This necessitates the provision in the penultimate sentence of this subdivision which accommodates to the possibility that a motion may be filed within 10 days of argument so that the normal response time of 10 days cannot be given.

Subdivision (b) contains an accommodation to the occasional emergency situation requiring ex parte relief, or possibly to a situation created by extremely late filing of motion so that it is impracticable to await response if effective relief is to be given. The protection given the adverse party in such a situation by the penultimate sentence is like that available to parties subjected ex parte to t.r.o.'s who may move to dissolve. Given the modest forms of relief which may be obtained by motion practice in the appellate division, all interests are thought adequately protected by this provision. The last sentence, providing that determination is ordinarily without oral argument, is new.

CASE NOTES

Cited in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

Rule 38

Substitution of Parties

(a) **Death of a Party.** No action abates by reason of the death of a party while an appeal may be taken or is pending, if the cause of action survives. If a party acting in an individual capacity dies after appeal is taken from any tribunal, the personal representative of the deceased party in a personal action, or the successor in interest of the deceased party in a real action may be substituted as a party on motion filed by the representative or the successor in interest or by any other party with the clerk of the court in which the action is then docketed. A motion to substitute made by a party shall be served upon the personal representative or successor in interest in addition to all other parties. If such a deceased party in a personal action has no personal representative, any party may in writing notify the court of the death, and the court in which the action is then docketed shall direct the proceedings to be had in order to substitute a personal representative.

If a party against whom an appeal may be taken dies after entry of a judgment or order but before appeal is taken, any party entitled to appeal therefrom may proceed as appellant as if death had not occurred; and after appeal is taken, substitution may then be effected in accordance with this subdivision. If a party entitled to appeal dies before filing a notice of appeal, appeal may be taken by his personal representative, or, if he has no personal representative, by his attorney of record within the time and in the manner prescribed in these rules; and after appeal is taken, substitution may then be effected in accordance with this rule.

(b) **Substitution for Other Causes.** If substitution of a party to an appeal is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a).

(c) **Public Officers; Death or Separation from Office.** When a person is a party to an appeal in an official or representative capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Prior to the qualification of a successor, the attorney of record for the former party may take any action required by these rules to be taken. An order of substitution may be made, but neither failure to enter such an order nor any misnomer in the name of a substituted party shall affect the substitution unless it be shown that the same affected the substantial rights of a party.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 37.

Commentary.

General. This rule deals with the situation created by the loss of legal capacity of a party by death or other occurrence at those stages of litigation after an appealable order or judgment has been entered for or against the erstwhile party. Former Sup. Ct. R. 37 dealt in limited fashion with the situation under the title "Abatement and Revivor." This treated only the death possibility. This new rule attempts to deal more clearly with the total situation.

Subdivision (a) deals only with the situation created by *death* of a party acting in an *individual* (as opposed to official) capacity. Substitution for such a party for other reasons than death is treated in subd. (b). The problem of substitution for parties acting in *official* capacities is treated in subd. (c). After stating

the basic non-abatement principle in its lead sentence, subdivision (a) then deals successively with the different situations created by death of parties in two distinct time intervals. The first is treated in the first paragraph and is that interval between the taking of appeal and its final disposition. The distinction made as to the proper persons to be substituted depending upon whether the action is "real" or "personal" is dictated by such cases as *Paschal v. Autry,* 256 N.C. 166 (1962), which hold in a variety of contexts that in real actions the cause passes to successors in interest, not personal representatives, so that judgments only against the latter would not bind the former. The substitution procedure described applies whether the deceased party was appellant or appellee. The last sentence of the first paragraph accommodates to the possibility that in a personal action, where the personal representative is the proper substitute party, none has been appointed. Here the opposing party, whether appellee or appellant, may invoke court intervention to provide a proper substitute. This provision is particularly necessary for appellants whose appeals simply cannot proceed until proper substitution for their deceased adversary is made.

The second paragraph deals with another possible time interval, and one which poses quite different problems. This is the time period after appealable judgment is entered but before appeal has been taken. Here it is necessary to differentiate between the deaths of potential appellants and of potential appellees. The first sentence deals with the death in this interval of a potential appellee. Here the aggrieved party may simply proceed to take appeal within the time limited, without first obtaining substitution. Under our procedure this problem could be posed (except in the most exceptional circumstance) only where the appellant had not taken appeal by oral notice, i.e., when he must both file and serve notice of appeal upon all other parties. This rule does not speak directly to the problem of affecting service in this situation upon the now deceased adverse party. A proper solution would seem to be to serve the party's attorney of record under App. R. 26(c), or if the action is a real action wherein successors in interest are readily ascertainable, upon them as the prospective substitute parties. After appeal has been taken, substitution as described for the post-appeal interval must then be made. The other possibility, of death of the potential appellant during this interval, is handled by authorizing his attorney of record to take appeal, with substitution to follow. (The alternative of appeal by personal representative is unlikely to be available in view of the 10-day limit on taking appeal, but could of course be realized.)

Subdivision (b) simply borrows the procedures of subdivision (a) for substitution necessitated by any other cause than death of a party acting in an individual capacity.

Subdivision (c) is new, with no counterpart in former rules.

CASE NOTES

Cited in Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Rule 39

Duties of Clerks; When Offices Open

(a) **General Provisions.** The clerks of the courts of the appellate divisions shall take the oaths and give the bonds required by law. The courts shall be deemed always open for the purpose of filing any proper paper and of making motions and issuing orders. The offices of the clerks with the clerks or deputies in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but the respective courts may provide by order that the offices of their clerks shall be open for specified hours on Saturdays or on particular legal holidays or shall be closed on particular business days.

(b) **Clerk's Docket Book, Judgment Docket and Minute Book.** There shall be maintained in the offices of the clerks of each of the courts of the appellate division (i) a docket book, (ii) a judgment docket, and (iii) a minute book.

(i) In the docket book the clerk shall enter all appeals, motions, petitions, and orders docketed or entered in the court.

(ii) In the judgment docket the clerk shall enter a brief memorandum of every final judgment or order of the court, show the party against whom costs are adjudicated, and identify each case by its title and its number in the docket book. The judgment docket shall be indexed and cross-indexed in alphabetical order to the name of all parties.

(iii) In the minute book the clerk shall enter a brief summary of the proceedings of the court in each appeal disposed of and a brief summary of all sittings and ceremonies of the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 39.

Commentary.

This rule is devoted to a description of those internal administrative and clerical operations of the clerk's offices in the appellate division which it is considered should be known to counsel in their conduct of appellate practice.

Rule 40

Consolidation of Actions on Appeal

Two or more actions which involve common questions of law may be consolidated for hearing upon motion of a party to any of the actions made to the appellate court wherein all are docketed, or upon the initiative of that court. Actions so consolidated will be calendared and heard as a single case. Upon consolidation, the parties may set the course of argument, within the times permitted by App. R. 30(b), by written agreement filed with the court prior to oral argument. This agreement shall control unless modified by the court.

Drafting Committee Note

Sources and parallels in former rules and statutes: Sup. Ct. R. 14.

Commentary.

This carries forward in restated form the provisions of former Sup. Ct. R. 14. That rule made no specific mention of the possibility that consolidation might be on either party or court initiative, but this was certainly implied. This new rule makes more specific the general provision in the former rule regarding the role of parties and court respectively in setting the "course of argument." The provisions of App. R. 30(b) are obviously available to parties in consolidated appeals to move for enlargement of the basic times therein allocated as totals for each "side."

Rule 41

Title

The title of these rules is "North Carolina Rules of Appellate Procedure." They may be so cited either in general references or in reference to particular rules. In reference to particular rules the abbreviated form of citation, "App. R. . . . ," is also appropriate.

APPENDIXES

Appendix A: Timetables for Appeals
Appendix B: Format and Style
Appendix C: Arrangement of Record on Appeal
Appendix D: Forms
Appendix E: Content of Briefs
Appendix F: Fees and Costs

Effect of Amendments. — The amendment adopted Dec. 7, 1982, and effective Jan. 1, 1983, substituted Appendixes A to F for the former Appendix of Tables and Forms.

APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	*Time (Days)*	*From date of*	*Rule Reference*
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (criminal)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and Serving Proposed Record on Appeal	30	Taking appeal	11(b)
Filing and Serving Objections or Proposed Alternative Record	15	Service of proposed record	11(c)
Requesting Judicial Settlement of Record	10	Last day within which last appellee served could file objections, etc.	11(c)
Settlement of Record by Judge	15	Receipt by judge of request for settlement	11(c)
Certification of Record by Clerk	10	Record on appeal settled	11(e)
Filing Record on Appeal in Appellate Court	10	Certification by clerk (but not more than 150 days from taking appeal)	12(a)

Action	*Time (Days)*	*From Date of*	*Rule Reference*
Filing Appellant's Brief	20	Clerk's mailing of printed record	12(b),13(a)
Filing Appellee's Brief	20	Service of appellant's brief	13(a)
Oral Argument	30 (usual minimum)	Filing appellant's brief	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	20	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	*Time (Days)*	*From date of*	*Rule Reference*
Petition for Discretionary Review Prior to Determination	15	Docketing appeal in Court of Appeals	15(a)
Notice of Appeal	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	14(a)
Cross-Notice of Appeal	10	Filing of first notice	14(a)
Petition for Discretionary Review	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	15(a)
Response to Petition for Discretionary Review	10	Service of petition	15(d)
Appellant's Brief	20	Docketing case	14(d),15(a)
Appellee's Brief	20	Service of appellant's brief	14(d),15(g)
Oral Argument	30 (usual minimum)	Filing appellant's brief	29

Action	*Time (Days)*	*From Date of*	*Rule Reference*
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	20	Mandate	31(a)

Note:

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review may be extended by order of the Court wherein the appeal is docketed at the time. However, the time for filing the record on appeal may be extended past 150 days from the date of taking appeal only by order of the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21)

APPENDIX B

Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11 inch, white paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format.

Papers shall be prepared using pica (10 pitch) type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be 60 spaces wide and 57 lines long. Tabs are located at the following spaces from the left margin: 5, 10, 15, 20, 30 (center), and 40.

Captions of Documents

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the judicial district from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. ____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA)
or)
(Name of Plaintiff)) From (Name) County
) No. _____
v)
)
(Name of Defendant))

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county and indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled to a NEW BRIEF.

Indexes

A brief or petition which is long or complex or which treats multiple issues, and all appendixes to briefs (Rule 28) and records on appeal (Rule 9) must contain an index to the contents.

The index should be indented ten spaces from *each* margin, providing a 40-space line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record) **I N D E X**

Organization of the Court 1
Complaint of Tri-Cities Mgf. Co. 1

* * *

* PLAINTIFF'S EVIDENCE:
John Smith 17
Tom Jones 23
Defendant's Motion for Nonsuit 84
* DEFENDANT'S EVIDENCE:
John Q. Public 86
Mary J. Public 92

* * *

Request for Jury Instructions 101
* Charge to the Jury 102
Jury Verdict 108
Order of Judgment 109
Appeal Entries 110
Order Extending Time 110

Assignments of Error 112
Certificate of Service 113
Stipulation of Counsel 114
Names and Addresses of Counsel 115

Use of the Transcript of Evidence with Record on Appeal

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the complete stenographic transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record. The transcript has been certified by (name), (deputy) (ass't) Clerk of the Superior Court of (name) County."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, file one copy in the appellate court, and provide the clerk of the superior court with a copy if required. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

Table of Cases and Authorities

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to *A Uniform System of Citation* (13th ed.).

Format of Body of Document

The body of the document should be single spaced with double spaces between paragraphs and triple spaces before topical headings.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented 10 spaces from the left margin and about five spaces from the right. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetical entry in the text. (R pp. 38-40) References to the transcript, if used, should be made in similar manner. (T p. 558)

Topical Headings

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin.

Sub-issues should be presented in similar format, but block indented five spaces from the left margin.

Numbering Pages

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

Signature and Address

All original papers filed in a case will bear the original signature of at least one counsel participating in the case. The name, address, and telephone number of the person signing, together with the capacity in which he signs the paper will be included. Counsel participating in argument must have signed the brief in the case prior to that argument.

APPENDIX C

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(b) in the particular case should be included in the record. See Rule 9(b)(5) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

TABLE 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(1)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(1)(ii)
4. Statement of record items showing jurisdiction, per Rule 9(b)(1)(iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court

*16. Court's instructions to jury, per Rule 9(b)(1)(vi)

17. Verdict

18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)
12. Entries showing settlement of record on appeal, extension of time, etc.
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

TABLE 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of jurors

*10. State's evidence, with any evidentiary rulings assigned as error

11. Motions at close of state's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings assigned as error

13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings assigned as error

15. Motions at close of all evidence, with rulings thereon (* if oral)

*16. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses and telephone numbers of counsel for all parties to appeal

TABLE 4

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings

1. Evidence admitted
   Q. Did you hear D. call a name?
   A. Yes.
   Q. Whose name did he call?
   Objection.
   Objection overruled.
   EXCEPTION No. 7.
   A. The name of E. F.
2. Evidence excluded
   Q. Did you hear D call a name?
   A. Yes.
   Q. Whose name did he call?
   Objection.
   Objection sustained.
   (Witness would have testified: "The name of E. F.")
   EXCEPTION No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.
Motion denied.
EXCEPTION No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

. . .

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

. . .

The court refused to submit issue No. 2.
EXCEPTION No. 10.

D. Examples related to judge's instructions to jury

1. Instruction erroneously given
   (Enclose in brackets portion of instructions to which exception is directed, followed by entry:)
   EXCEPTION No. 11.
2. Law not explained, as required by N.C.R.Civ.P. 51

(Entry to be made at end of instructions given by court:)
The court failed to instruct the jury on the doctrine of last clear chance.
EXCEPTION No. 12.

3. Law not applied to evidence, as required by N.C.R.Civ.P. 51
(Entry to be made at end of instructions given by court.)
The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.
EXCEPTION No. 13.

TABLE 5

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).
EXCEPTION No. 1, R p. 4.
2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.
EXCEPTION No. 2, R p. 7.
3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.
EXCEPTION No. 3, R p. 10.
4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.
EXCEPTION No. 4, R p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F. R p. 30, on the ground that the testimony was hearsay.
EXCEPTION No. 7, R p. 29.
EXCEPTION No. 8, R p. 30.
2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.
EXCEPTION No. 8, R p. 45.
3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.
EXCEPTION No. 10, R p. 51.
4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.
EXCEPTION No. 11, R p. 54.
5. The court's denial of defendant's motion for a new trial for newly discovered evidence; on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

EXCEPTION No. 9, R p. 80.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence; on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.
   EXCEPTION No. 1, R p. 20.
2. The court's Finding of Fact No. 10 on the ground that there was insufficient evidence to support it.
   EXCEPTION No. 2, R p. 25.
3. The court's Conclusion of Law No. 3, on the ground that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.
   EXCEPTION No. 3, R p. 27.

APPENDIX D

FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. Notices of Appeal

a. *to Court of Appeals from Trial Division*

Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff) (Defendant) (NAME OF PARTY) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this . . . . . day of . . . . . 19. . . ..

s/. . . . . .

Attorney for (Plaintiff) (Defendant)

(Address and Telephone)

b. *to Supreme Court from a Judgment of the Superior Court Including a Sentence of Life Imprisonment or Death*

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a sentence of (death) (imprisonment for life).

Respectfully submitted this . . . . . day of . . . . . 19. . . ..

s/. . . . . .

Attorney for Defendant-Appellant

(Address and Telephone)

c. *to the Supreme Court from a Judgment of the Court of Appeals*

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it), which judgment. . .

(*Constitutional question* — G.S. 7A-30(1)) . . . directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, e.g.:

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search warrant, thereby depriving the defendant of his constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7 thru 10). Exception No. 11 (R p 136). This constitutional issue was determined erroneously by the Court of Appeals."

(*dissent* — G.S. 7A-30(2)) . . . was entered with a dissent by Judge (name).

(*rate-making* — G.S. 7A-30(3)) . . . was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case.

Respectfully submitted this . . . . . day of . . . . . 19. . . ..

s/. . . . . .

Attorney for (Plaintiff) (Defendant)-Appellant

(Address and Telephone)

2. Appeal Entries

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4(a)(1);
2) judicial approval of the undertaking on appeal required by App. Rules 6; and
3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Per Tables 1, 2, and 3 of Appendix C, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). Appeal bond in the sum of $. . . . . adjudged to be sufficient. (Defendant) is allowed . . . . . days in which to serve proposed record on appeal, and (plaintiff) is allowed . . . . . days thereafter within which to serve objections or a proposed alternative record on appeal.

This . . . . . day of . . . . . ., 19. . . ..

s/. . . . . .
Judge Presiding

3. Petition for Discretionary Review Under G.S. 7A-31.

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals.

Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Respectfully submitted this . . . . . day of . . . . . 19. . . ..

s/. . . . . .
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. Petition for Writ of Certiorari

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the (Honorable (name), Judge Presiding, (name) County Superior (District) Court) (North Carolina Court of Appeals), dated (date) (here describe the judgment, order, or decree appealed from); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of petition: e.g. failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: e.g., reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the (Superior Court of (name) County) (North Carolina Court of Appeals) to permit review of the (judgment) (order) (decree) above specified, upon errors (to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the . . . . . day of . . . . . ., 19. . . ..

s/. . . . . .
Attorney for Petitioner
(Address and Telephone)
(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. Petition for Writ of Supersedeas under Rule 23 and Motion for Temporary Stay

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the (Honorable . . . . . ., Judge Presiding, (Superior) (District) Court of . . . . . County) (North Carolina Court of Appeals), dated . . . . . ., pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under G.S. Section . . . . . inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ: e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the (Superior) (District) Court of . . . . . County) (North Carolina Court of Appeals) staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the . . . . . day of . . . . . ., 19. . . ..

s/. . . . . .
Attorney for Petitioner
(Address and Telephone)
(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this application, movant shows that (here set out legal and factual argument for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened of petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable . . . . . ., Judge Presiding, Superior Court of . . . . . County, sentenced the defendant to death, execution being set for (date of execution)

2. That pursuant to G.S. 15A-2000 (d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the . . . . . day of . . . . . ., 19. . . ..

s/. . . . . .
Attorney for Defendant
(Address and Telephone)
(Certificate of Service on
Attorney General, District Attorney,
and Warden of Central Prison)

APPENDIX E

CONTENT OF BRIEFS

CAPTION

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, e.g., DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, e.g., DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

INDEX OF THE BRIEF

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

TABLE OF CASES AND AUTHORITIES ii
QUESTIONS PRESENTED 1
STATEMENT OF THE CASE 2
STATEMENT OF THE FACTS 2
ARGUMENT:
I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION 10
* * *
IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF A WARRANTLESS SEARCH OF HIS APARTMENT BECAUSE THE CONSENT GIVEN WAS THE PRODUCT OF POLICE COERCION 28
CONCLUSION 34
CERTIFICATE OF SERVICE 35
APPENDIX:
VOIR DIRE DIRECT EXAMINATION OF JOHN Q. PUBLIC . . . . . App. 1 - 7
VOIR DIRE CROSS-EXAMINATION OF JOHN Q. PUBLIC . . . . . App. 8 - 11
VOIR DIRE DIRECT EXAMINATION OF OFFICER LAW N. ORDER . . . . . App. 12 - 17
VOIR DIRE CROSS-EXAMINATION OF OFFICER LAW N. ORDER . . . . . App. 18 - 20

* * * * *

TABLE OF CASES AND AUTHORITIES

This table should begin at the top margin of the page following the Index. Page reference should be made to the first citation of the authority in each question to which it pertains.

TABLE OF CASES AND AUTHORITIES

Dunaway v New York, 442 US 200, 99 SCt 2248, 60 LEd2d 824 (1979) 11
State v Perry, 298 NC 502, 259 SE2d 496 (1979) 14
State v Reynolds, 298 NC 380, 259 SE2d 843 (1979) 12
United States v Mendenhall, 446 US 544, 100 SCt 1870, 64 LEd2d 497 (1980) 14

4th Amendment, U. S. Constitution 28
14th Amendment, U. S. Constitution 28

GS 15A-221 29
GS 15A-222 28
GS 15A-223 29

* * * * *

QUESTIONS PRESENTED

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented need not be identical with that set forth in the assignments of error in the record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

STATEMENT OF THE CASE

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1981, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1981.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 22, 1982. The record was filed and docketed in the Supreme Court on April 5, 1982.

STATEMENT OF THE FACTS

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

ARGUMENT

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, e.g.,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.
ASSIGNMENT OF ERROR NO. 2 (R p 45)
EXCEPTION NOS. 5 (R p 23), 6 (T p 366), and 7 (T pp 367-390)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the appendix to the brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument.

CONCLUSION

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

SIGNATURE AND CERTIFICATE OF SERVICE

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the third tab.

The Certificate of Service is then shown with centered, upper case heading, the certificate itself, describing the manner of service upon the opposing party, with the complete mailing address of the party or attorney served blocked on the first tab, followed by the date and the signature of the person certifying the service.

APPENDIX TO THE BRIEF UNDER THE TRANSCRIPT OPTION

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving a directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The appendix should include a table of contents, showing the issue from the brief, followed by the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

CONTENTS OF APPENDIX

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

Voir Dire Direct Examination of John Q. Public (T pp 17-24) (Brief p. 8) 1
Voir Dire Cross-Examination of John Q. Public (T pp 24-28) (Brief p. 8) 8
Voir Dire Direct Examination of Officer Law N. Order (T pp 29-34) (Brief p. 9) 12
Voir Dire Cross-Examination of Officer Law N. Order (T pp 34-36) (Brief p. 10) 18

* * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

APPENDIX F

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas — docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to clerk, Court of Appeals) where review of judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $200.00 is required in civil cases per Appellate Rule 6. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $4.00 per printed page where the document is retyped and printed; $1.50 per printed page where the clerk determines that the document is in proper format and can be printed from the original. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28 (b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00 and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

(3) ORDER TRANSFERRING CERTAIN CASES FROM THE COURT OF APPEALS TO THE SUPREME COURT

(Rescinded as of November 1, 1971.)

(4) RULES OF PRACTICE IN THE COURT OF APPEALS OF NORTH CAROLINA

(Superseded as of July 1, 1975.)

Editor's Note. — These rules are superseded by the North Carolina Rules of Appellate Procedure, adopted by the Supreme Court June 13, 1975, and effective with respect to appeals in which notice of appeal was given on or after July 1, 1975. See Appendix I (2A).

(5) GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule
2. Calendaring of Civil Cases.
3. Continuances.
5. Form of Pleadings.
21. Jury Instruction Conference.
22. Local Court Rules.

1. Philosophy of General Rules of Practice.

CASE NOTES

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

2. Calendaring of Civil Cases.

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and first full week following the 4th of July or such other weeks as the Senior Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclu-

sion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.*

Effect of Amendments. — This rule was rewritten by amendment adopted June 3, 1980, effective July 1, 1980.

CASE NOTES

Notice to Party Not Represented By Counsel. — Although rule formerly specified that the calendar be sent to each attorney of record and that the copy of the certificate of readiness be sent to opposing counsel, it was implicit in the rule that where a party is not represented by counsel he is entitled to the same notice. Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444, cert. denied, 300 N.C. 558, 270 S.E.2d 109 (1980).

Cited in Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

3. Continuances.

An application for a continuance shall be made to the presiding judge of the court in which the case is calendared.

When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court.

At mixed sessions, criminal cases in which the defendant is in jail shall have absolute priority.

Effect of Amendments. — The amendment adopted Feb. 13, 1973, deleted "Federal Court" following "Appellate Courts," in the second paragraph.

CASE NOTES

The granting of a continuance is within the discretion of the trial court, and its exercise will not be reviewed in the absence of manifest abuse of discretion. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Where a motion for continuance is based on a right guaranteed by the Constitution, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion.

State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Error and Prejudice Must Be Shown. — A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. State v. Harrill, 289 N.C. 186, 221 S.E.2d 325, death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

Applied in Lee v. Jenkins, 57 N.C. App. 522, 291 S.E.2d 797 (1982).

5. Form of Pleadings.

All papers presented to the court for filing shall be letter size (8 1/2″ x 11″), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size. This rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

Effect of Amendments. — The amendment effective July 1, 1982, rewrote the rule.

6. Motions in Civil Actions.

CASE NOTES

Rule Number Necessary. — The trial judge should decline to rule upon motions which did not contain the rule number under which the movant is proceeding. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Except When Defense of Insufficiency of Service of Process Asserted in Responsive Pleading. — Although worded as a motion, the defense of insufficiency of service of process was asserted in defendant's responsive pleading; therefore, the rule requiring that a movant state the rule number under which he is proceeding was inapplicable, and failure of defendant to so state did not constitute waiver of his defense of invalid service of process. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

A motion which did not comply with the first paragraph of this rule was not totally defective since the directive of this rule of practice has the salutory purpose of ensuring that the court and the parties are aware of the grounds upon which the movant is relying, the court's order in the case indicated that the judge was fully aware of the basis for the motion. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

In a child custody proceeding where the defendant filed a motion for modification of a child visitation order, the plaintiff was not prejudiced by failure of the defendant to state the number of the rule under which he was proceeding as required by this rule since the written motion fully informed the plaintiff of the relief he was seeking and his reasons therefor. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Where there is an awareness by the trial judge of the grounds, the motion is adequately stated for the purposes of this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Applied in Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976).

Stated in Don's Plumbing Co. v. Union Supply Co., 11 N.C. App. 662, 182 S.E.2d 219 (1971); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Cited in Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577 (1981).

8. Discovery.

Cross References. — As to sequence and timing of discovery, see § 1A-1, Rule 26(d).

CASE NOTES

Applied in Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980).

Cited in Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978).

9. Call of Docket.

CASE NOTES

Defendant May Not Make Opening Statement Personally. — The defendant, while retaining the services of his court-appointed counsel was not entitled to make an opening statement in propria persona. State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

Cited in State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

10. Opening and Concluding Arguments.

CASE NOTES

Trial Judge Controls Sequence of Argument. — The time and sequence of argument of a case to the jury is controlled by the trial judge under the authority of this rule. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972).

And He May Rule at Close of Evidence. — The trial judge is not required to rule upon the sequence of the argument prior to the closing of the evidence. State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69, appeal dismissed, 279 N.C. 727, 185 S.E.2d 704 (1971), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 807 (1972).

When there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify is without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

The trial court properly allowed the State to close the argument where defendant called a witness and examined him but did not glean helpful information from the witness because the witness refused to incriminate himself. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

Proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. State v. Hall, 57 N.C. App. 561, 291 S.E.2d 812 (1982).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

Quoted in State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970); State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

11. Examination of Witnesses.

CASE NOTES

Discretion of Trial Judge as to Change of Counsel. — This rule clearly leaves it to the discretion of the trial court to permit a change of counsel if a lengthy examination is imminent. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

12. Courtroom Decorum.

Legal Periodicals. — For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

CASE NOTES

Applied in State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982).

15. Photographs and Reproduction of Court Proceedings.

Rule Suspended until Oct. 18, 1984. — The order adopted Sept. 21, 1982, and effective Oct. 18, 1982, provides that this rule and Canon 3A(7) of the Code of Judicial Conduct, published in 276 N.C. at 740, are hereby suspended to and including Oct. 18, 1984, and electronic media and still photograph coverage of public judicial proceedings in the appellate and trial courts of this State shall be allowed on an experimental basis, in accordance with the terms of the order. For the aforementioned order concerning electronic media and still photography coverage of public judicial proceedings, see Appendix I-A of this volume.

16. Withdrawal of Appearance.

CASE NOTES

Attorney-Client Relationship Dissolved at Any Time. — As between the attorney and his client, the relationship may, in good faith, be dissolved at any time. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), cert. denied, 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

But Withdrawal from Litigation Must Be Justified. — The attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. High Point Bank & Trust Co. v. Morgan-Schultheiss, Inc., 33 N.C. App. 406, 235 S.E.2d 693, cert. denied, 293 N.C. 258, 237 S.E.2d 535 (1977), cert. denied, 439 U.S. 958, 99 S. Ct. 360, 58 L. Ed. 2d 350 (1978).

No more than adequate or reasonable notice is required for an attorney to withdraw as attorney of record. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

21. Jury Instruction Conference.

At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.[1]

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; or (ii) to inform the jury on a point of law which should have been covered in the original instructions. The provisions of the first two paragraphs of this Rule 21 also apply to the giving of all additional instructions, except that the court in its discretion shall decide whether additional argument will be permitted.

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[1] In criminal cases, the provisions of G.S. 15A-1231 are also applicable.

Editor's Note. — This rule was adopted Sept. 15, 1981.

CASE NOTES

Conference Need Not Be Recorded. — The rule does not require that the conference be on the record. State v. Thompson, 59 N.C. App. 425, 297 S.E.2d 177 (1982), appeal dismissed & cert. denied, — N.C. —, 299 S.E.2d 650 (1983).

This rule does not require that the instruction conference be recorded or that the judge's proposed charge be reduced to writing and submitted to counsel. By the very wording of the rule itself, it is clear that the instruction conference contemplated by this rule shall be held "for the purpose of discussing the proposed instructions" and providing an opportunity for counsel to object to any of the instructions proposed by the judge or to request additional instructions. State v. Fennell, 307 N.C. 258, 297 S.E.2d 393 (1982).

Conference Not Recorded Absent Request. — Where either party to the trial desires a recorded instruction conference, § 15A-1231(b) requires that party to make such a request to the trial judge. Absent such a request, § 15A-1231(b) is silent and this rule supplements the statute (pursuant to § 7A-34) by requiring the trial court to hold an unrecorded conference. State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

No Conflict with § 15A-1231(b). — Since this rule requires a conference without regard to whether it is requested by a party and § 15A-1231(b) requires a recorded conference only at the request of either party, there is no conflict between the two provisions. Both may be given full effect. State v. Bennett, — N.C. —, 302 S.E.2d 786 (1983).

Failure to Request Conference. — Where defendant did not request an instruction conference, he cannot assert as error the trial court's failure to conduct one. State v. Morris, — N.C. App. —, 300 S.E.2d 46 (1983).

Subsection (b) of § 15A-1231 clearly contemplates that a defendant is required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of § 7A-34, the provision of this rule which requires the trial judge to conduct a jury instruction conference conflicts with subsection (b) of § 15A-1231 and must give way to the provisions of the statute. State v. Morris, — N.C. App. —, 300 S.E.2d 46 (1983).

Cited in State v. Owens, — N.C. App. —, 300 S.E.2d 581 (1983); State v. Thompson, — N.C. App. —, 302 S.E.2d 310 (1983).

22. Local Court Rules.

In order to insure general uniformity throughout each respective judicial district, all trial judges shall observe and enforce the local rules in effect in any judicial district where they are assigned to hold court. The senior resident judge shall see that each judge assigned to hold a session of court in his district is furnished with a copy of the local court rules at or before the commencement of his assignment.

Editor's Note. — This rule was adopted Sept. 21, 1981.

Appendix I-A. Order Concerning Electronic Media and Still Photography Coverage of Public Judicial Proceedings

Effective 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including 18 October 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this State shall be allowed on an experimental basis, in accordance with the terms of this order.

1. Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

2. Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this State, subject to the conditions below.

(a) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings.

(b) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and *in camera* proceedings.

(c) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(d) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated 2(d).

3. Location of equipment and personnel.

(a) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval

of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(b) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(c) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(d) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(e) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) Prior to the convening of proceedings;

(ii) During the luncheon recess;

(iii) During any court recess with the permission of the presiding justice or judge; and

(iv) After adjournment for the day of the proceedings.

(f) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of rule 3(a) and (b) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

4. Official representatives of the media.

(a) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(b) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

5. Equipment and personnel.

(a) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(e) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

6. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

7. Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

8. Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

9. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceedings subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

Editor's Note. — The order was adopted Sept. 21, 1982.

Effect of Amendments. — The amendment adopted Nov. 10, 1982, inserted "justice or" in subdivision 2(a), inserted "or courtroom" in subdivision 3(d), substituted "presiding justice or judge" for "trial judge" in subdivision 3(e) (iii), and added subdivision 3(f).

Appendix II. Rules of Practice in United States District Courts and Bankruptcy Courts

(1) United States District Court for the Middle District of North Carolina

As Amended to July 15, 1983.

Table of Rules

I. General Rules

RULE

2. Attorneys
   - (b) Eligibility and Admission
     - (1) Definition of Those Eligible
     - (2) Procedure and Oath
   - (c) Fee
   - (d) Litigants Must Be Represented by Member of the Bar of This Court; Special Admissions
   - (f) Disbarment and Discipline
     - (1) Standards of Conduct
     - (2) Notice and Hearing
     - (3) Practice Before Admission or During Suspension; Contempt of Court
   - (g) Public Discussion of Litigation by Attorneys
     - (1) Release of Information by Attorneys
     - (2) Same: Pending Investigation
     - (3) Same: From Arrest
     - (4) Same: Matters of Record
     - (5) Same: During Trial
     - (6) Same: After Trial
     - (7) Same: More Restrictive Rules
     - (8) Same: Civil Actions
3. Court Schedule and Conduct of Business
   - (c) Court in Continuous Session
   - (d) Place of Holding Court; Time for Opening
   - (g) Preparation of Trial Calendars
   - (h) Release of Information by Courthouse Personnel
4. Naturalization
6. Briefs
   - (a) Service
   - (c) Citation of Cases
     - (1) State Court
     - (2) District Court
     - (3) Circuit Court of Appeals
     - (4) U.S. Supreme Court
     - (5) U.S. Supreme Court, cert. denied
7. Jurors
   - (a) Number of Jurors in Civil Jury Cases
   - (b) Court Techniques to Insure a Fair Trial
   - (c) Examination of Jurors
   - (d) Same: Scope
   - (e) Same: Questions Requested by Counsel
   - (f) Jury Lists
     - (1) Availability Before Session of Court
     - (2) Availability at Session of Court
   - (g) Instructions to Jury
8. Jury Arguments
9. Transcript of Proceedings
11. Trial Publicity
    - (a) Photographing and Reproduction of Court Proceedings
12. Orders and Judgments Grantable by Clerk
    - (1) Substitution of Attorneys
    - (2) Extension of Time to Plead, Answer Interrogatories and Requests for Admission
    - (3) Extension of Time to File Record on Appeal
    - (4) Dismissing Actions
    - (5) Default Judgments
    - (6) Canceling Liability on Bonds
    - (7) Opening and Adjourning Court
    - (8) Ex Parte Orders Authorized by Local Rule 21(h)
15. Exhibits; Depositions, Private Property
    - (a) Marking; Copies
    - (b) Custody
    - (c) Exhibits to Pleadings
    - (d) Disposition of Private Property

II. Civil Rules

17. Form of Pleadings and Documents
    - (a) Generally

Rule
(b) Class Actions
(c) Prisoner Petitions Filed Pro Se under 42 U.S.C. § 1983
18. Filing Fee and Security for Costs
(a) Initiating Civil Actions
(b) Filing Notice of or Petition for Appeal
19. Filing of Papers and Service
(a) Filing of Papers or Pleadings
(b) Service of Papers
(e) Files in Condemnation Actions Commenced by the United States
21. Motions in Civil Actions
(a) Form
(b) Content
(e) Decided on Motion Papers and Briefs
(h) Extension of Time for Filing Supporting Documents and Briefs
(k) Conference of Attorneys with Respect to Motions and Objections Relating to Discovery
(l) Motions for Continuance
(n) Failure to File and Serve Motion Papers
22. Pre-Trial and Discovery in Civil Cases
(f) Use of Discovery Procedures
24. Minors and Incompetents as Parties
(f) Same: Hearings
(g) Consent Judgments Approving Settlement; Contents
(1) Consent
(2) Contents
(k) Payment of Judgment
25. Trial Procedure
(a) Opening Statements in Civil Actions
(b) Documentary Trial Exhibits
27. Taxation of Costs
(e) Costs in Cases Which Have Been Settled

III. Criminal Rules

28. Plan for Prompt Disposition of Criminal Cases
29, 30. [Superseded.]
34. Post-Conviction Motions
(a) Generally
(b) Federal Prisoners
(c) State Prisoners
35. Representation of Indigent Defendants

IV. Bankruptcy

36. Chapter X Bankruptcy Cases
37-49. [Rescinded.]

V. United States Magistrates

50. [Rescinded.]
50.1. Jurisdiction; Authority; Special Designation
(a) Designation to Hear Pretrial Matters, Conduct Hearings and Submit Findings and Recommendations; Special Designations
(b) Assignment of Additional Duties; Authority
(c) Assignment of Duties and Reference of Cases to Magistrates
50.2. Civil Trials
(a) Consent to Exercise of Civil Jurisdiction
(b) Withdrawal of Consent
(c) Reference Discretionary
50.3. Civil Appeals
(a) Nondispositive Pretrial Matters
(b) Dispositive Pretrial Motions and Prisoner Cases
(c) Trials; Consent
(d) Stay Pending Appeal
50.4. Payment of Fixed Sum in Lieu of Appearance
(a) Forfeiture of Collateral
(b) Mandatory Appearances
50.5. Recording Proceedings
(a) Court Reporters; Requests; Agreements of Parties
51. [Rescinded.]
52. Forfeiture of Collateral Security in Lieu of Appearance

APPENDIX OF FORMS

BANKRUPTCY FORMS

Form
2-4. [Deleted.]

I. General Rules

Rule 2.

ATTORNEYS

(b) Eligibility and Admission.

(1) Any person who has been admitted to practice and is in good standing before the Supreme Court of North Carolina, and who is a resident of the State of North Carolina, is eligible for admission to the bar of this court.

(2) Eligible attorneys may be admitted to practice in this court by the court or by the full-time United States magistrate upon oral motion made by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

I do solemnly swear [affirm] that I have been admitted to practice before the Supreme Court of North Carolina, and that I am a member in good standing of that court; that I am a resident of the State of North Carolina; that to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court uprightly and according to law, SO HELP ME GOD. [SUCH BE MY SOLEMN AFFIRMATION.]

(c) Fee. The fee for admission to the bar of this court shall be $10.00 payable to the clerk at the time of admission.

(d) Litigants Must Be Represented by Member of the Bar of This Court; Special Admissions.

(1) Litigants in civil and criminal actions and parties in bankruptcy proceedings, except governmental agencies and parties appearing *pro se,* must be represented by at least one member of the bar of this court, who shall state his name, mailing address and telephone number on each pleading. The service of all pleadings and notices permitted by the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure shall be sufficient if served upon such attorney.

(2) Any person who is a member in good standing of the bar of the Supreme Court of the United States, or the bar of the highest court of any state in the United States, or the District of Columbia, shall be permitted to appear in a particular case in association with a member of the bar of this court.

(3) All pleadings presented to the clerk for filing, except by attorneys representing governmental agencies or parties appearing *pro se,* shall be rejected unless signed by at least one attorney who is a member of the bar of this court.

(f) Disbarment and Discipline.

(1) The standards of conduct of the members of the bar of this court shall be those standards prescribed by the canons of professional ethics of the American Bar Association and the canons of ethics of the North Carolina State Bar as they are now written and as they are hereafter modified or amended.

(2) Upon notice and hearing, any member of the bar of this court may, for good cause shown, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper. Whenever any member of the bar of this court has been disbarred from practice by either the appellate or trial division of the General Court of Justice, the North Carolina State Bar, or as otherwise provided by North Carolina General Statutes § 84-28, and such disbarment has become final, such member shall be disbarred forthwith from practice in this court, without notice or a hearing, upon the filing in this court of a certified copy of the final order of disbarment.

(3) Any attorney who before his admission to the bar of this court, or during his disbarment or suspension, exercises any of the privileges of the members of the bar of this court, or pretends to be entitled to do so, shall be guilty of contempt of court and subject to appropriate punishment therefor.

(g) Public Discussion of Litigation by Attorneys.

(1) *Release of Information by Attorneys.* It is the duty of the lawyer or law firm not to release or authorize the release of information or opinion which a reasonable person would expect to be disseminated by means of public communication, in connection with pending or imminent criminal litigation with which he or the firm is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

(2) *Same: Pending Investigation.* With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial

statement which a reasonable person would expect to be disseminated by means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is under way, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

(3) *Same: From Arrest.* From the time of arrest, issuance of an arrest warrant, or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer or law firm associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication, relating to that matter and concerning:

(i) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer or law firm may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(ii) The existence or contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(iii) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(iv) The identity, testimony, or credibility of prospective witnesses, except that the lawyer or law firm may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(v) The possibility of a plea of guilty to the offense charged or a lesser offense;

(vi) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

(4) *Same: Matters of Record.* The foregoing shall not be construed to preclude the lawyer or law firm during this period, in the proper discharge of his or its official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

(5) *Same: During Trial.* During the trial of any criminal matter, including the period of selection of the jury, no lawyer or law firm associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial which a reasonable person would expect to be disseminated by means of public communication, except that the lawyer or law firm may quote from or refer without comment to public records of the court in the case.

(6) *Same: After Trial.* After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement which a reasonable person

would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

(7) *Same: More Restrictive Rules.* Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

(8) *Same: Civil Actions.* A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, which a reasonable person would expect to be disseminated by means of public communication if there is a reasonable likelihood that such dissemination will interfere with a fair trial and which relates to:

(i) Evidence regarding the occurrence or transaction involved;

(ii) The character, credibility, or criminal record of a party, witness, or prospective witness;

(iii) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such;

(iv) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule;

(v) Any other matter reasonably likely to interfere with a fair trial of the action.

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendments, it is not set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "may" for "shall," inserted "by the Court or by the full-time United States magistrate" and deleted "in open court" in the first sentence of subsection (b)(2), added present subsection (1) of section (f) and redesignated former subsections (1) and (2) of section (f) as (2) and (3), inserted the references to law firms throughout section (g) and made conforming changes so as to make that section applicable to law firms as well as attorneys, substituted "which a reasonable person would expect to be disseminated by means of public communication" for "for dissemination by any means of public communication" in subsections (1), (2), (3), (5) and (6) of section (g) and added subsection (8) of section (g). The amendment also inserted "or associated with" near the beginning of subsection (2) of section (g).

The amendment adopted Nov. 8, 1973, increased the fee in section (c) from $2.00 to $10.00.

The amendment adopted March 14, 1975, substituted "Litigants in civil and criminal actions and parties in bankruptcy proceedings" for "Every litigant in civil and criminal actions" at the beginning of the first sentence of subsection (d)(1) and "mailing" for "office" preceding "address" near the end of that sentence.

CASE NOTES

Applied in Stewart v. Richards, 2 Bankr. 219 (Bankr. M.D.N.C. 1980).

Rule 3.

COURT SCHEDULE AND CONDUCT OF BUSINESS

(c) Court in Continuous Session. The court shall be in continuous session in all divisions of the district, and all civil matters are deemed to be in an open status and subject to call at any time upon reasonable notice to the interested parties.

(d) Place of Holding Court; Time for Opening. Regular sessions of court, motion days, pre-trial conferences, and other court business, will be conducted in the courtroom located in the United States Post Office Building in division headquarters, unless otherwise directed. Court shall commence at 9:30 A.M. unless otherwise announced.

(g) Preparation of Trial Calendars. All pending criminal cases are calendared for trial at each regular criminal session of court as a matter of course. Trial date in civil cases will be announced by the court, if known, at the time of the final pre-trial conference.

(h) Release of Information by Courthouse Personnel. All courthouse personnel, including, among others, the United States marshal and his deputies, the Clerk of Court and his deputies, bailiffs, and court reporters, are prohibited from disclosing to any person, without authorization by the court, information relating to a case that is not part of the public records of the court. This proscription applies to the divulgence of information concerning arguments and hearings held in chambers or otherwise outside the presence of the public.

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendments, only sections (c), (d), (g) and (h) are set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "civil matters" for "matters, criminal and civil, not reached at regular sessions of court" and deleted "before the next regular session of court" following "any time" in section (c), corrected an error in punctuation in section (d), rewrote the second sentence of section (g) and deleted "pending criminal" preceding "case" near the end of the first sentence of section (h).

The amendment adopted Aug. 2, 1973, deleted the former second sentence of section (d), which provided that on opening day of regular sessions court should commence at 10 A.M., and deleted "On all other days" at the beginning of the present second sentence of section (d).

Rule 4.

NATURALIZATION

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, at Greensboro, North Carolina, on Fridays after the third Mondays in March, July and October, beginning at 2:00 P.M., unless otherwise ordered by the court. The court may, in its discretion, at other times, consider and act upon petitions for naturalization by members of the armed services, and seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "third Monday in May and November" for "first Monday in June and December" in the first sentence and inserted "appropriate patriotic" in the former second sentence.

The amendment adopted Jan. 12, 1973, substituted "North Carolina, on Fridays after the third Mondays in March, July and October, beginning at 2:00 P.M." for "on Friday after the third Monday in May and November of each year" in the first sentence.

The amendment adopted March 14, 1975, deleted "regularly" preceding "considered" near the beginning of the first sentence, added "unless otherwise ordered by the court" at the end of the first sentence and deleted the former second sentence, which provided for a committee to arrange for and conduct appropriate patriotic ceremonies in connection with naturalization proceedings.

Rule 6.

BRIEFS

(a) Service. Every brief required by these rules or an order of the court shall be served upon opposing parties or their counsel before it is presented to the clerk, and the brief shall clearly indicate the time and method of service. Briefs shall not become a part of the record in the case nor be considered to be a part of the "original papers" within the meaning of those words as used in Local Rule 10.

(c) Citation of Cases. Cases cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations of this rule [underscore names of parties]:

(1) State Court citations:
  (a) Court of Appeals:
    Atkinson v. *Wilkerson,* 10 N.C. App. 643, 179 S.E.2d 872 (1971).
  (b) The Supreme Court:
    Link v. *Link,* 278 N.C. 181, 179 S.E.2d 697 (1971).

(2) District Court citations:
  (a) Published:
    First National Bank of Catawba County v. *Wachovia Bank & Trust Co.,* N.A., 325 F. Supp. 523 (M.D.N.C. 1971).
  (b) Not published:
    Wise v. *Richardson,* No. C-191-S-70 (M.D.N.C., Aug. 11, 1971).

(3) Circuit Court of Appeals:
  (a) Published decisions:
    Mullins v. *Oakley,* 437 F.2d 1217 (4th Cir. 1971).
  (b) Decisions not published:
    Brown v. *Hirst,* No. 71-1291 (4th Cir., June 8, 1971).
    Cason v. *State of North Carolina,* mem. dec., No. 13,535 (4th Cir., July 14, 1970).
    Smith v. *Jones,* Misc. No. 15,356 (4th Cir., Aug. 10, 1971).

(4) United States Supreme Court citations:
    McMann v. *Richardson,* 397 U.S. 759, 90 S. Ct. 1441, 25 L.Ed.2d 763 (1970).

(5) If a petition for certiorari was filed in the United States Supreme Court, disposition of the case in the Supreme Court should always be shown with parallel citations. For example: *Carson* v. *Warlick,* 238 F.2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S. Ct. 665, 1 L.Ed.2d 664 (1957).

Only Part of Rule Set Out. — As section (b) was not changed by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added to the second sentence of section (a) the language beginning "nor be considered" and rewrote section (c).

Rule 7.

JURORS

(a) Number of Jurors in Civil Jury Cases. In all civil jury cases the jury shall consist of six (6) members.

(b) Court Techniques to Insure a Fair Trial. In every case the court will endeavor to aid in the selection of an impartial jury. However, in the trial of criminal cases calculated to attract substantial public interest, in order to shield the jurors from prejudicial publicity and to insure the accused a fair trial, the court, on its own motion, or on the motion of either party, without

disclosure of the identity of the movant, may, among other things, order a continuance, a change of venue, sequestration of jurors, sequestration of witnesses, expand the *voir dire* examination of prospective jurors and issue cautionary instructions.

(c) Examination of Jurors. The court shall conduct the examination of prospective jurors.

(d) Same: Scope.

(1) In conducting the examination of jurors in civil cases, the court shall interrogate the jurors in such a fashion and manner as reasonably calculated to elicit from the jurors any prior knowledge of the case, and any connection they might have with the litigants and their attorneys, either personally, professionally, socially, economically or otherwise. The jurors shall also be asked if they know of any reason why they could not sit with the other jurors, hear the evidence in the case, the arguments of counsel, and the instructions of the court, and then render to each of the parties a fair and impartial trial and verdict.

(2) In criminal cases, the line of questioning set out in subsection (d) (1) of this rule shall be followed, where appropriate, and in addition the court shall determine whether any juror is or has been a law enforcement or peace officer.

(e) Same: Questions Requested by Counsel. After the court has completed its interrogation, counsel may request additional questions to be asked the jurors. If deemed by the court to be proper, the jurors will then be interrogated with respect to the matters requested by counsel.

(f) Jury Lists.

(1) The names of prospective jurors for any session of court or for a specific case shall not be disclosed prior to their reporting for duty except in compliance with instructions of the court. No juror shall be approached, either directly or through any member of his immediate family, in an effort to secure information concerning his background.

(2) The clerk shall make available to counsel for the parties, or to any party acting *pro se,* a jury list which sets forth the name, general address and occupation of each juror when court is opened for the session or case for which the jurors were summoned.

(g) Instructions to Jury. In all cases tried by a jury, the points on which either party desires the jury to be instructed must be in writing and furnished to the court before jury arguments commence.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, changed the reference in present subsection (d) (2), rewrote present subsection (f) (1) and deleted "When the jurors report for duty at a session of court" at the beginning and added the language beginning "when court is opened" at the end of present subsection (f) (2).

The amendment adopted Oct. 14, 1971, effective Jan. 1, 1972, added present section (a) and redesignated former sections (a) through (f) as (b) through (g).

Rule 8.

JURY ARGUMENTS

In the trial of civil actions the party having the burden of proof shall have the right to open and close the jury argument, without regard to whether the defendant has offered evidence. If each of the parties has the burden of proof on one or more issues, the Court, in its discretion, shall determine the order of arguments. All arguments shall be subject to such time limitations as may be imposed by the Court.

Comment: See Rule 29.1, F.R.Cr.P. entitled *"Closing Argument"* in criminal cases.

Effect of Amendments. — The amendment adopted May 13, 1977, rewrote the first sentence so as to confine the application of this rule to civil actions. The amendment also substituted "If" for "Where" in the second sentence and "may" for "might" in the third sentence.

Rule 9.

TRANSCRIPT OF PROCEEDINGS

Upon request of any party, official court reporters will furnish transcripts of all proceedings at rates not exceeding transcript rates established by the Judicial Conference of the United States.

Special arrangements must be made in advance of the trial for daily copy. A certified copy of all transcripts must be delivered to the clerk for the records of the court without charge to the parties. Except as to transcripts to be paid for by the United States, the court reporter shall not be required to prepare transcripts without the deposit of adequate security, or to furnish such transcripts prior to the payment therefor. 28 U.S.C. § 753(f).

Effect of Amendments. — The amendment adopted March 14, 1975, rewrote the first paragraph.

Rule 11.

TRIAL PUBLICITY

(a) Photographing and Reproduction of Court Proceedings. The taking of photographs in the courtroom or its environs, or radio or television broadcasting from the courtroom or its environs, during the progress of or in connection with judicial proceedings, including proceedings before a United States magistrate, whether or not court is actually in session, is prohibited. The word "environs" is defined to mean the offices and corridors on floors on which are located courtrooms or offices of the United States attorney, the United States marshal, the United States district court clerk or the United States probation officer. Proceedings, other than judicial proceedings, designed and conducted as ceremonies, such as administering oaths of office to appointed officials of the court, presentation of portraits, and similar ceremonial occasions, may be photographed in or broadcast from the courtroom, under the supervision of the court.

Only Part of Rule Set Out. — As section (b) was not changed by the amendment, it is not set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, deleted "commissioner or" following "United States" in the first sentence of section (a).

Rule 12.

ORDERS AND JUDGMENTS GRANTABLE BY CLERK

Pursuant to the provisions of Rule 77(c), Federal Rules of Civil Procedure, the clerk is authorized to grant and enter the following orders and judgments without further direction by the court, but his action may be suspended, altered or rescinded by the court for cause shown:

(1) Consent orders for the substitution of attorneys.

(2) Consent orders extending for not more than 60 days the time within which to answer or otherwise plead, answer interrogatories submitted under Rule 33, Federal Rules of Civil Procedure, or requests for admission as provided for in Rule 36, Federal Rules of Civil Procedure. Matters in bankruptcy and those matters set forth in Rule 6(b), Federal Rules of Civil Procedure, are not included in this authorization.

(3) Consent orders extending for not more than 60 days the time to file the record on appeal and to docket the appeal in the appellate court, except in criminal cases.

(4) Consent orders dismissing an action, except in bankruptcy proceedings and in causes to which Rule 23(c) and Rule 66, Federal Rules of Civil Procedure apply.

(5) Judgments of default as provided for in Rule 55(a) and 55(b) (1), Federal Rules of Civil Procedure.

(6) Orders canceling liability on bonds other than orders disbursing funds from the clerk's registry account.

(7) Orders changing the time of opening and adjourning court in absence of the judge.

(8) *Ex parte* orders authorized by Local Rule 21(h).

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "60 days" for "30 days" near the beginning of subdivisions (2) and (3), added "other than orders disbursing funds from the clerk's registry account" at the end of subdivision (6), and added subdivision (8).

Rule 15.

EXHIBITS; DEPOSITIONS; PRIVATE PROPERTY

(a) Marking; Copies.

The court will give counsel instructions with respect to pre-trial marking and the number of extra copies of trial exhibits desired in each case.

(b) Custody.

(1) Unless otherwise directed by the court, all trial exhibits admitted in evidence shall be placed in the custody of the clerk, except as provided in subsection (2) below.

(2) All exhibits not suitable for filing and transmission to the Court of Appeals as a part of a record on appeal shall be retained in the custody of the party offering them, subject to the orders of the court. Such exhibits shall include, but not be limited to, the following types of bulky and sensitive exhibits: narcotics and other controlled substances, firearms, ammunition, explosive devices, jewelry, liquor, poisonous or dangerous chemicals, money or articles of high monetary value, counterfeit money, and documents or physical exhibits of unusual bulk or weight. At the conclusion of a trial or proceeding in which there is a right to appeal, the party offering such exhibits shall retake custody of them and be responsible to the court for preserving them in their

condition as of the time admitted until any appeal is resolved or the time for appeal has expired. The party retaining custody shall make such exhibits available to opposing counsel for use in preparation of an appeal and be responsible for their safe transmission to the appellate court, if required.

If there is no right of appeal, all exhibits, including exhibits in the clerk's custody, may be delivered to or retaken immediately by the party offering them. Any exhibits in the clerk's custody more than 30 days after the time for appeal has expired or an appeal has been decided and mandate received may be returned to the parties or destroyed by the clerk.

(3) Depositions read into the court record are considered exhibits for which the parties shall be responsible as provided in paragraph (2). Depositions (or those portions of depositions) admitted as evidence but not read into the record shall be retained in the clerk's custody and disposed of as authorized by the last two sentences in subsection (2) of this rule.

(c) Exhibits to Pleadings.

Bulky, numerous or voluminous materials not absolutely essential to a pleading, motion or brief or other paper submitted for filing may not be attached to or incorporated by reference in pleadings, motions or briefs. The court may order a paper stricken if filed in violation of this rule.

(d) Disposition of Private Property.

Whenever, during the course of an investigation, a trial of any action, or any other proceeding in this court, any money, contraband or other private property comes into the possession or custody of a law-enforcement officer or any officer of the court, which will require an order of this court to determine its ownership or proper disposition, it is the responsibility of the attorney representing the party having original custody or control of such property to apply to the court for an order determining its ownership and directing its disposition.

This application must be made at the conclusion of the litigation while all parties are before the court in person or through their attorneys.

If the court cannot determine ownership or the proper disposition on the basis of the record or information from the parties before it, application must be made for an order providing for temporary custody pending institution of appropriate civil proceedings to determine final ownership or disposition.

The court will impose sanctions against any attorney whose failure to comply with this rule requires a subsequent hearing or court proceeding which would otherwise not have been necessary.

Comment

Sections 15(a) and (b) are broad enough to permit the judge, at the final pre-trial conference, or at any time, to give special instructions with respect to marking and the number of copies needed, and to permit jurors to take exhibits into the jury room.

The clerk's office and personnel are not equipped to provide secure custody of sensitive or bulky exhibits without incurring unreasonable risks. Courtroom deputies have other duties and responsibilities requiring their attention which increase security risks. The Department of Justice and the Drug Enforcement Administration have indicated they have no general objection to courts relieving clerks of this responsibility. The court may, under this rule, upon timely motion by a party, order that sensitive exhibits be maintained in such manner and by such persons as it deems appropriate.

There is no reason for the clerk to maintain custody of an exhibit after the case is decided except to transmit it to the Court of Appeals. See Rules 10(a) and 11(b) Fed. R. App. P. If there is a new trial by court order of the district or appellate court, the exhibit would have to be offered in the new trial under the same rules as were applicable when first offered following custody or possession by the offering party. Unnecessary use of expensive court storage space is discouraged.

Although the rules permit the use of exhibits to pleadings, motions and briefs, the inclusion as exhibits of unnecessary and evidentiary

materials such as books, lengthy computer printouts, and large maps, present problems for the court in filing, storing and locating relevant and necessary materials. When incorporated in pleadings, they become a formal part thereof for all purposes and may not be disposed of under the rules governing disposition of trial exhibits. Rule 15(c) requires counsel to plead contents, quote from, or use as exhibits only necessary pages of voluminous materials rather than incorporate extraneous materials as pleading exhibits. In appropriate cases, the court may exercise its power to order such materials stricken under Rule 12(f). *cf.* Rules 8(a), 8(e) and 10(c) Fed. R. Civ. P.

Effect of Amendments. — The amendment adopted Aug. 2, 1973, substituted "within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court" for "except as otherwise directed by the Court, within 30 days after the judgment becomes final" at the end of the first sentence of former section (b)(1).

II. Civil Rules

Rule 17.

FORM OF PLEADINGS AND DOCUMENTS

(a) Generally.

(1) All pleadings following the complaint and papers submitted for filing must designate the case number of the action and fully conform to the provisions of Rules 10 and 11, Federal Rules of Civil Procedure. Each paper presented to the clerk for filing shall be flat and unfolded, without manuscript cover, and firmly bound. The pages shall be legal size and numbered at the bottom. Double spacing is preferred.

(2) Requests for temporary restraining orders or injunctive relief set forth in complaints shall be treated as any other prayers for relief. If facts and circumstances are deemed to warrant urgent, preferential consideration of a request for a temporary restraining order or injunctive relief, such request shall be set out in a motion complying with the requirements of Local Rule 21.

(3) Where the complaint discloses that none of the plaintiffs or defendants is a resident of the division in which the complaint is captioned for filing, the clerk shall change the caption so as to designate the filing of the complaint and the issuance of the summons in a division in which one of the plaintiffs or one of the defendants reside. The clerk shall promptly notify the plaintiff, or his counsel, of the division in which the case has thus been docketed. The same procedure shall be followed in civil cases removed from the state courts to the district court.

(b) Class Actions. In any case sought to be maintained as a class action:

(1) The complaint shall bear next to its caption the legend, "Complaint — Class Action."

(2) The complaint shall contain under a separate heading, styled "Class Action Allegations":

(a) A reference to the portion or portions of Rule 23, F.R.Civ.P., under which it is claimed that the suit is properly maintainable as a class action.

(b) Appropriate allegations thought to justify such claim, including, but not necessarily limited to:

1. the size (or approximate size) and definition of the alleged class,
2. the basis upon which the plaintiff (or plaintiffs) claims
   (i) to be an adequate representative of the class, or
   (ii) if the class is comprised of defendants, that those named as parties are adequate representatives of the class.
3. the alleged questions of law or fact claimed to be common to the class, and
4. in actions claimed to be maintainable as class actions under subdivision (b)(3) of Rule 23, F.R.Civ.P., allegations thought to support the findings required by that subdivision.

(3) Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the court for renewal of the motion before the same judge.

(4) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross claim alleged to be brought for or against a class.

(5) The burden shall be upon any party seeking to maintain a case as a class action to show the court that the action is properly maintainable as such. If the court determines that an action may be maintained as a class action the party obtaining that determination shall initially bear the expenses of and be responsible for giving such notice as the court may order to members of the class.

(c) Prisoner Petitions Filed Pro Se under 42 U.S.C. § 1983. Pro se petitions by prisoners seeking relief under 42 U.S.C. § 1983 shall be filed in compliance with instructions and on forms available without charge in the office of the clerk.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added present subsection (2) and redesignated former subsections (2) and (3) as (3) and (4) of section (a).

The amendment adopted March 14, 1975, designated the former provisions of this rule as section (a) and added section (b). In present section (a) the amendment inserted "following the complaint" near the beginning of the first sentence and added the second, third and fourth sentences of subsection (1) and deleted former subsection (4), which required that each paper presented to the clerk for filing be flat and unfolded, without manuscript cover, and firmly bound.

The amendment adopted Sept. 3, 1975, substituted "initially bear the expenses of" for "be charged with the expense" in the second sentence of subsection (5) of section (b).

The amendment adopted October 12, 1976, substituted "the latter instance" for "such instances" near the beginning of the last sentence of subsection (6) of section (b), which subsection was deleted by the 1981 amendment.

The amendment adopted May 13, 1977, added section (c).

The amendment adopted June 16, 1981, deleted subsection (6) of section (b), which concerned communication with potential or actual class members not formal parties to the action.

CASE NOTES

Applied in Garrett v. R.J. Reynolds Indus., Inc., 81 F.R.D. 25 (M.D.N.C. 1978).

Rule 18.

FILING FEE AND SECURITY FOR COSTS

(a) Initiating Civil Actions. Any party, other than the United States government or its departments and agencies, shall pay a filing fee of $15.00 upon instituting any civil action, suit or proceeding, whether by original process, removal or otherwise, except that on application for a writ of habeas corpus the filing fee shall be $5.00.

No bond nor security for costs shall be required of parties instituting civil actions, unless otherwise ordered by the court, except as required by 28 U.S.C. § 1446(d) upon filing of a petition for removal of a civil action or proceeding.

(b) Filing Notice of or Petition for Appeal. Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5.00 shall be paid to the clerk of the district court, by the appellant or petitioner. 28 U.S.C. § 1917.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, rewrote former sections (a) and (b) (now section (a)) and added former section (c) (now section (b)).

The amendment adopted Aug. 2, 1973, deleted former subsection (2) of section (a), requiring a $200 bond or deposit as security for costs.

The amendment adopted July 17, 1975, rewrote former sections (a) and (b) as present section (a) and redesignated former section (c) as (b).

Rule 19.

FILING OF PAPERS AND SERVICE

(a) Filing of Papers or Pleadings. Subsequent to the institution of an action, with the exception of papers filed with the judge as provided in Rule 5(e), Federal Rules of Civil Procedure, the original of all pleadings, motions, notices of hearing and other papers shall be filed with the clerk at Greensboro, North Carolina. A copy of the following should be delivered to the clerk for use by the court and its staff when the original is filed:

(1) A brief.
(2) Proposed findings of facts and conclusions of law.
(3) Requests for jury instructions.
(4) Final pre-trial order.

(b) Service of Papers.

(1) Except in cases in which the United States is a party, it shall be the responsibility of counsel filing papers to serve *one* copy on each opposing party or his counsel.

(2) In cases in which the United States is a party, in addition to the copies of the summons and complaint required by Rule 4(d)(4) and 4(d)(5), Federal Rules of Civil Procedure, *three* copies of each pleading or other paper shall be served on the United States attorney.

(e) Files in Condemnation Actions Commenced by the United States. Where the United States files separate condemnation actions and a single declaration of taking relating to those separate actions, the clerk is authorized to establish a Master File in which the declaration of taking may be filed, and the filing of the declaration of taking therein shall constitute a filing of the same in each of the actions to which it relates.

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendments, it is not set out.

Effect of Amendments. — The amendment adopted March 14, 1975, deleted "patent, trade-mark and anti-trust cases, and" following "Except in" at the beginning of subsection (1) of section (b), deleted former subsection (2) of section (b), which required two copies of all papers to be served in patent, trade-mark and anti-trust cases, and redesignated former subsection (3) of section (b) as (2).

The amendment adopted July 17, 1975, added section (e).

Rule 21.

MOTIONS IN CIVIL ACTIONS

(a) Form. All motions and objections to interrogatories and requests for admissions, unless made during a hearing or trial, shall be in writing.

(b) Content. All motions shall state with particularity the grounds therefor, shall cite any statute or rule of procedure relied upon, and shall set forth the relief or order sought.

(e) Decided on Motion Papers and Briefs.

(1) Motions shall be considered and decided by the court on the pleadings, admissible evidence in the official court file, motion papers and briefs, without hearing or oral argument, unless otherwise ordered by the court.

Special facts, considerations or reasons thought by counsel sufficient to warrant a hearing or oral argument may be brought to the court's attention by memorandum filed contemporaneously with their motion (or response).

(2) If oral argument is ordered, it shall be heard on the date and in such division within the district as the court may designate.

(3) The clerk shall give at least five days' notice of the date and place of oral argument. The court, however, for good cause may shorten the five-day notice period.

(h) Extension of Time for Filing Supporting Documents and Briefs. The clerk may enter an *ex parte* order, or approve a stipulation by the parties, specifying the time within which supporting documents may be filed pursuant to subsections (f) and (g), upon a showing in writing that such documents are not available or for good reason cannot be filed contemporaneously with the motion or response. Applications for extensions of time by the clerk, together with a proposed order, shall be filed with the motion or response to which they relate. The time allowed an opposing party for filing a responsive document(s) shall not run during any such extension.

(k) Conference of Attorneys with Respect to Motions and Objections Relating to Discovery. To curtail undue delay in the administration of justice, the court shall hereafter refuse to consider motions and objections relating to discovery and production of documents, pursuant to Rules 26 through 37, Federal Rules of Civil Procedure, unless moving counsel shall first advise the court in writing that after personal consultation and sincere attempts to resolve differences they are unable to reach complete accord. The statement shall set forth the date of the conference, the names of the participating attorneys and the specific results achieved. It shall be the responsibility of counsel for the movant to arrange for the conference, and in the absence of an agreement to the contrary, the conference shall be held in the office of the attorney nearest the court in the division in which the action is pending.

(l) Motions for Continuance. All motions to continue a pre-trial conference, hearing on a motion, or the trial of an action shall be presented to the court for its consideration, even though counsel have agreed to such continuance. No such continuance will be granted other than for good cause and upon such terms and conditions as the court may impose.

(n) Failure to File and Serve Motion Papers. If briefs are required, the failure of the movant or respondent to file a brief, or the failure of a respondent to file his response, within the times specified in this rule, shall constitute a waiver of the right thereafter to file such brief or response, except upon a showing of excusable neglect. A motion unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be summarily denied. A response unaccompanied by a brief, when a brief is required, may, in the discretion of the court, be disregarded and the motion to which it expresses opposition considered and decided as an uncontested motion. If a respondent fails to file his response within the time required by this rule, the motion will

be considered and decided as an uncontested motion, and normally will be granted without notice to the parties.

Only Part of Rule Set Out. — Only the sections changed by the amendments are set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, made changes in sections (a), (h), (l) and (n). In section (a), the amendment substituted "and" for "including" following "motions" near the beginning of the section. In section (h), the amendment inserted "Response" in the catchline and "a response" and "response and/or" in the first sentence, inserted "briefs" and "the clerk may" the second time those words appear in the first sentence, deleted the former second sentence and rewrote the last sentence. In section (l), the amendment added "All" at the beginning of the first sentence and substituted the language beginning "shall be presented" for "shall not be granted by the mere agreement by counsel" at the end of the first sentence and deleted "Any such motion, verbal or written, must be considered by the court, and" at the beginning of the second sentence. In section (n), the amendment substituted "of the right thereafter to file" for "to file thereafter" in the first sentence and inserted "the motion to which it expresses opposition" in the third sentence.

The amendment adopted March 14, 1975, substituted "Form" for "Must Be in Writing" in the catchline to section (a) and "Content" for "Ground Must Be Stated" in the catchline to section (b), inserted "shall cite any statute or rule of procedure relied upon" in section (b), rewrote section (e) and substituted "consider" for "here" near the beginning of the first sentence of section (k).

The amendment adopted July 17, 1975, rewrote the first paragraph of subsection (1) of section (e) and substituted "considerations or reasons" for "or considerations" and inserted "or oral argument" in the second paragraph of that subsection. The amendment also added the third sentence in section (h).

The amendment adopted May 13, 1977, rewrote section (h).

Rule 22.

PRE-TRIAL AND DISCOVERY IN CIVIL CASES

(f) Use of Discovery Procedures. Attorneys are expected to make the fullest possible use of all discovery procedures provided for by Rules 26 through 37, Federal Rules of Civil Procedure, rather than seek information or admissions at the conference of attorneys or at the final pre-trial conference.

A party filing interrogatories or requests for admissions shall number the same consecutively from the first such interrogatory or request filed to the last, regardless of the dates of filing or the number of sets of such interrogatories or requests filed.

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only section (f) is set out.

Effect of Amendments. — The amendment adopted March 14, 1975, added the second paragraph of section (f).

Rule 24.

MINORS AND INCOMPETENTS AS PARTIES

(f) Same: Hearings.

(1) Upon oral or written motion of the parties, the court will conduct a hearing to determine whether the settlement is fair and reasonable and for the best interests of the minor or incompetent.

(2) At the time of the hearing, the attorneys for the parties shall present, to the satisfaction of the court, the following:

(i) A statement of the facts giving rise to the cause of action set forth in the pleadings, the contentions of the parties with respect to liability and a stipulation covering all relevant and material facts not considered to be in genuine dispute.

(ii) A statement showing the nature and extent of the injuries, the extent of the recovery from such injuries, and the prognosis. Such statement shall be supported by copies of all pertinent medical reports, including a current report of the attending physician.

(iii) Statements of the attorney and parents or guardian of the minor or incompetent as to their satisfaction with the settlement, and their opinion as to the fairness and reasonableness of such proposed settlement.

(iv) If material, a statement showing the amount of the medical, hospital and other expenses incurred, or to be incurred, in the treatment of the injuries of the minor or incompetent.

(3) If deemed necessary, the parties should also be prepared to offer sworn testimony of witnesses and furnish documentary evidence in support of all findings made by the court.

(g) Consent Judgments Approving Settlement; Contents.

(1) Before judgments approving compromise settlements of claims of minors or incompetents are presented to the court, they shall be consented and agreed to by counsel for the parties to the action and by the next friend or guardian of the minor or incompetent.

(2) The judgment presented should provide, *inter alia,* that the parties have agreed to a settlement of all matters in controversy between them and the amount of the settlement; that the court has investigated the matter of the proposed settlement and considered the evidence offered by the parties; that the court is of the opinion, and finds as a fact, that the proposed compromise settlement is fair and reasonable and is for the best interests of the minor or incompetent; and that the court is of the opinion, and finds as a fact, that the compromise settlement agreement should be ratified, approved and confirmed by the court.

(k) Payment of Judgment. The amount of the judgment shall be paid into the office of the clerk of this court and the clerk shall make such disbursements from the proceeds as provided by the judgment of the court. The balance of the proceeds of the judgment shall be paid to the legal guardian of the minor or incompetent, if within this state. If there is no such guardian, the balance of the proceeds shall be paid to the clerk of superior court of the county in this state in which the minor or incompetent resides. If the minor or incompetent does not reside within this state, the balance shall be paid to a legal guardian approved by the court.

Only Part of Rule Set Out. — Only the sections changed by the amendments are set out.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, added "Consent" at the beginning and "Contents" at the end of the catchline to section (g) and deleted the catchlines "To be consented to" at the beginning of subsection (1) and "Contents" at the beginning of subsection (2) of section (g). The amendment also inserted "in this state" in the third sentence of section (k) and added the fourth sentence of section (k).

The amendment adopted Aug. 2, 1973, rewrote subsection (1) of section (g), substituting "are" for "shall be" preceding "presented," "they" for "the judgment" preceding "shall be consented" and "the" for "all" preceding "parties," inserting "and" preceding "by the next friend" and deleting "and, in cases where the minor is at least 18 years of age, by the minor plaintiffs" at the end of the subsection.

The amendment adopted March 14, 1975, deleted the former second sentence of subdivision (2)(iii) of section (f), which read: "If at least 18 years of age, a similar statement shall be presented by any minor plaintiff."

Rule 25.

TRIAL PROCEDURE

(a) Opening Statements in Civil Actions. At the commencement of the trial of civil actions, the party upon whom rests the burden of proof shall state, without argument, his cause of action and the evidence by which he expects to sustain his claim. The adverse party shall then state, without argument, his defense and the evidence by which he expects to sustain same. If the trial is to the jury, the opening statement shall be made immediately after the jury is sworn. If the trial is to the court, the opening statement shall be made immediately after the case is called for trial. Opening statements shall be subject to such time limitations as may be imposed by the court.

(b) Documentary Trial Exhibits. When counsel expect to examine a witness or may reasonably anticipate cross-examination concerning details of a document, they should have at trial a copy of such document for use by the trial judge in following testimony. Copies of such documents are not to be filed with the clerk.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, substituted "sworn" for "empaneled" at the end of the third sentence of section (a).

The amendment adopted March 14, 1975, designated the former provisions of this rule as section (a) and added section (b).

Rule 27.

TAXATION OF COSTS

(e) Costs in Cases Which Have Been Settled.

(1) The court will not determine the party entitled to recover costs or the amount thereof in any action terminated by compromise or settlement. Settlement agreements should resolve any issues relating to costs. In the absence of specific agreement, each party shall bear his own costs.

(2) It is preferred that costs be paid directly to the party entitled to reimbursement, who may then file a certificate of satisfaction with the clerk.

Only Part of Rule Set Out. — As the rest of this rule was not changed by the amendment, only section (e) is set out.

Effect of Amendments. — The amendment adopted May 13, 1977, added section (e).

III. Criminal Rules

Rule 28.

PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES

The Court's Plan for the Prompt Disposition of Criminal Cases in compliance with Rule 50(b) of the Federal Rules of Criminal Procedure, the Speedy Trial Act of 1974 (18 U.S.C. § 3161 *et seq.*), and the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5036, 5037), as approved by the Judicial Council, is a public document available through the office of the clerk of this court. The Court's Plan for the Prompt Disposition of Criminal Cases as it now exists and as it is hereafter amended and approved by the Judicial Council shall have the same force and effect as a local rule of this court.

Effect of Amendments. — The amendment adopted Nov. 7, 1972, effective Jan. 1, 1973, rewrote this rule so as to combine former Rules 28, 29 and 30 and to set out the court's plan for the prompt disposition of criminal cases.

The amendment adopted Aug. 2, 1973, changed the time fixed for arraignment in the rule as rewritten in 1972.

The amendment adopted Sept. 3, 1975, rewrote this rule, which formerly set out the court's plan for the prompt disposition of criminal cases.

Rule 29.

[Superseded]

Cross References. — See amendment note to Rule 28.

Rule 30.

[Superseded]

Cross References. — See amendment note to Rule 28.

Rule 34.

POST-CONVICTION MOTIONS

(a) Generally. Motions filed pursuant to 28 United States Code § 2255 making a collateral attack upon a sentence imposed by this court, and petitions for writs of habeas corpus filed in this court by persons in state custody, shall be in writing, signed and verified. Additionally, such motions and petitions shall be on forms supplied by the court, and, to the extent applicable, all information required by the form shall be fully and accurately given.

(b) Federal Prisoners. Upon the filing by a federal prisoner of a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, the clerk shall cause one copy of the motion to be delivered immediately to the United States attorney. The United States shall file an answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies and shall set forth affirmatively any other reason for denying relief. The United States shall attach to its answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days after the service of the motion, unless a shorter time is ordered by the magistrate or court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

(c) State Prisoners. Upon the filing by a state prisoner of an application for a writ of habeas corpus under the provisions of 28 U.S.C. §§ 2241, et seq., the clerk shall cause one copy of the application to be mailed immediately to the respondent. The respondent shall file answer to each claim asserted, shall admit or deny the allegations or contentions upon which the petitioner relies, and shall set forth affirmatively any other reason for denying relief. The respondent shall attach to his answer certified copies of the indictment, plea of petitioner, and the judgment, or such of them, and such other records, including the records of any post-conviction proceedings, as may be material to the issues joined.

The original of the answer and attachments shall be filed with the clerk and a copy of the answer shall be served on the petitioner or his counsel within twenty days (forty days in cases brought under 28 U.S.C. § 2254) after service of the application unless a shorter time is ordered by the magistrate or the court. The date and method of service on the petitioner shall be indicated on the original answer filed with the clerk.

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, designated the former provisions of this rule as section (a) and added sections (b) and (c). Sections (b) and (c) had been previously adopted by order dated Dec. 2, 1970, and designated therein as (a) and (b).

The amendment adopted Nov. 12, 1971, inserted "(forty days in cases brought under 28 U.S.C. § 2254)" in the first sentence of the second paragraph of section (c) and also inserted "the" preceding "court" near the end of that sentence.

Rule 35.

REPRESENTATION OF INDIGENT DEFENDANTS

The plan of the court for the representation of defendants who are financially unable to obtain an adequate defense, and for the furnishing of expert and other services, pursuant to the Criminal Justice Act of 1964, as amended, provides for representation by private attorneys.

A copy of the court's plan is available upon request of the clerk. Panels of attorneys in each division deemed competent to provide adequate representation for indigent defendants shall be maintained and revised from time to time as specified in the plan or as directed by the court so that all qualified members of the bar of this court may have equal opportunities to participate in and responsibilities for representation of defendants under the Act. The court may, in the exercise of its discretion, appoint attorneys to represent defendants under the Act whose names do not appear on the panels. Generally, an attorney shall have had one year of experience in the practice of law before being considered qualified to render service under the Act.

In approving compensation for services rendered by an attorney pursuant to the Criminal Justice Act of 1964 the court will observe the Judicial Conference guidelines which provide, in part, that "(T)he hourly rates of compensation fixed by the amended Act are designated and intended to be maximum rates and should be treated as such. In fixing the rate, the judge should bear in mind the qualification of attorneys and the relative difficulties encountered in presenting the case. These changes in the hourly rates were made, . . ., to meet the changes in the price structure of the nation since the original Act was passed. They are not intended to change the basic and underlying philosophy of the Act that the bar of the nation owes a responsibility to represent persons financially unable to retain counsel and that the compensation provided is not intended to equate private counsel fees."

Effect of Amendments. — The amendment adopted Sept. 17, 1971, effective Jan. 1, 1972, inserted "as amended" in the first paragraph.

The amendment adopted March 14, 1975, rewrote this rule.

IV. Bankruptcy

Rule 36.

CHAPTER X BANKRUPTCY CASES

Upon the filing of a petition seeking relief under Chapter X of the Bankruptcy Act, the clerk shall refer the case forthwith to the referee as bankruptcy judge; thereafter all proceedings in the case shall be before the referee except as otherwise provided by Rule 10-103 of the Chapter X Rules.

Editor's Note. — This rule was adopted Aug. 1, 1975. Former Rule 36, which related to filing fees, was rescinded by order adopted March 14, 1975.

Rules 37-49.

[Rescinded]

Cross References. — For orders promulgated by the United States Bankruptcy Court for the Middle District of North Carolina pertaining to the effect on local bankruptcy rules and procedures of the Bankruptcy Rules promulgated by the U.S. Supreme Court on April 25, 1983, and effective August 1, 1983, see Appendix II (1A) of this volume.

Editor's Note. — These rules were rescinded by amendment adopted March 14, 1975.

V. United States Magistrates

Rule 50.

[Rescinded]

Editor's Note. — This rule was adopted by order dated December 2, 1970, and rescinded by order dated February 14, 1980. For present rules covering the same subject matter, see Rules 50.1 to 50.5.

Rule 50.1.*

JURISDICTION; AUTHORITY; SPECIAL DESIGNATION

(a) Designation to Hear Pretrial Matters, Conduct Hearings and Submit Findings and Recommendations; Special Designations.

(1) Full time magistrates are authorized and designated to exercise the powers and authority and to perform the duties enumerated in 28 U.S.C. § 636 (b)(1) and (2).

(2) Unless otherwise limited in their orders of appointment, full time magistrates serving this court are specially designated to:

(A) Exercise civil jurisdiction to conduct any or all proceedings in jury or nonjury cases and order the entry of judgment in any case referred to them for that purpose, pursuant to 28 U.S.C. § 636 (c), and

(B) Exercise jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors committed within this judicial district, pursuant to 18 U.S.C. § 3401.

(b) Assignment of Additional Duties; Authority.

Pursuant to 28 U.S.C. § 636 (b)(3), full time magistrates are authorized to perform additional functions and duties, including the following, when assigned to do so in manner provided in section (c):

(1) Conduct pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings;
(2) Conduct calendar and status calls of civil and criminal calendars, and determine motions to expedite or postpone the trial of cases;
(3) Conduct arraignments in cases not triable by the magistrate to the extent of taking a not guilty plea or noting a defendant's intention to plead guilty or nolo contendere and ordering a presentence report in appropriate cases;
(4) Conduct voir dire and select petit juries for the court;
(5) Accept petit jury verdicts in civil cases in the absence of a judge;
(6) Conduct preliminary proceedings relating to the potential revocation of probation;
(7) Issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings;
(8) Order the exoneration or forfeiture of bonds;
(9) Conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484 (d);
(10) Conduct examinations of judgment debtors, in accordance with Rule 69 of the Federal Rules of Civil Procedure;
(11) Review petitions in civil commitment proceedings under Title III of the Narcotic Addict Rehabilitation Act;
(12) Conduct such hearings as are necessary or appropriate, and submit to a judge proposed findings of fact and recommendations for disposition of applications for judgment by default pursuant to Rule 55(b) of the Federal Rules of Civil Procedure, or motions to set aside judgments by default pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, in accordance with the procedure set out in Rule 50.3(b).
(13) Consider an application by a complainant pursuant to 42 U.S.C. § 2000e-5(f)(1), and in such circumstances as may be deemed just, appoint an attorney for such complainant, and authorize the commencement of an action without payment of fees, costs, or giving security therefor;
(14) Issue orders or warrants authorizing acts necessary in the performance of the duties of administrative and regulatory agencies and departments of the United States government;
(15) Conduct extradition proceedings, in accordance with 18 U.S.C § 3184;
(16) Supervise proceedings conducted pursuant to letters rogatory, in accordance with 28 U.S.C. § 1782;
(17) Require compliance with Local Rule 17(c) with regard to *pro se* petitions under 42 U.S.C. § 1983; and
(18) Perform any additional duty which is not inconsistent with the Constitution and laws of the United States.

(c) Assignment of Duties and Reference of Cases to Magistrates. Duties and cases may be assigned or referred to United States Magistrates:
(1) By a court order entered in the action;
(2) By the clerk in compliance with:
(i) A standing order, or
(ii) The instructions or directions of a judge.

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* Magistrates Rules will become a separate part of the Local Rules when revision is complete and be redesignated Part IV, Rule 401 et seq.

Comment. — 28 U.S.C. § 363 (a) confers upon United States Magistrates "... (1) all the powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; (2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of Title 18, and take acknowledgments, affidavits, and depositions; and (3) the power to conduct trials under section 3401, Title 18, United States Code, in conformity with and subject to the limitations of that section."

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.2.

CIVIL TRIALS

(a) Consent to Exercise of Civil Jurisdiction.

(1) The consent of a party to the exercise of civil jurisdiction authorized in 28 U.S.C. § 636 (c)(1) may be communicated to the clerk by letter, or by a form available in the clerk's office, signed by the party or his attorney.

(2) A consent may not be limited to trial by a particular magistrate or contain any other condition. A conditional consent is ineffective.

(3) To protect voluntariness the consent of a party will be placed in the public court file only when the Court has ordered the case referred to a magistrate.

(4) Parties intervening by permission after reference are deemed to have consented.

(b) Withdrawal of Consent.

After a case has been referred, the consent of the parties to the exercise of a magistrate's jurisdiction may not be withdrawn without the approval of the court.

(c) Reference Discretionary.

Reference of a case to a magistrate after the consent of all parties is within the discretion of the Court.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.3.

CIVIL APPEALS

(a) Nondispositive Pretrial Matters.

(1) When a United States Magistrate issues a final order pursuant to 28 U.S.C. § 636 (a) or (b)(1)(A), any party has the right to appeal to a United States District Judge as provided herein unless:

(A) The statute or rule granting authority to the United States Magistrate to issue such order specifically provides a different procedure for review; or

(B) Review of the order may ultimately be obtained in a trial of the action or in another proceeding.

(2) Appeal is taken by written notice filed with the Clerk within 10 days after entry of the order appealed from, and served upon the other parties.
(3) The notice of appeal must specify the order or part thereof appealed from and state the basis for asserting that it is clearly erroneous or contrary to law.
(4) No response or briefs are required unless ordered by the judge.

(b) Dispositive Pretrial Motions and Prisoner Cases.

(1) When a party objects to a magistrate's proposed findings and recommendations in the manner provided in 28 U.S.C. § 636 (b)(1)(C), he must:
(A) File the objection with the clerk;
(B) Specify those portions of the proposed findings and recommendations to which objection is made; and
(C) File with the Clerk a transcript of the specific portions of any evidentiary proceeding to which objection is made.
(2) No additional hearing will be held unless ordered by the judge.
(3) No response or briefs are required unless ordered by the judge.

(c) Trials; Consent.

(1) A consent to appeal on the record to a judge of the district court, pursuant to 28 U.S.C. § 636 (c)(4):
(A) May be communicated to the Clerk by letter, or by a form available in the Clerk's Office, signed by a party or his attorney.
(B) May not be conditional or limited to a particular judge.
(2) After all parties have consented to an appeal to a judge no party may withdraw consent without approval of a judge.
(3) A party intervening by permission after all original parties have consented to appeal to a district judge is deemed to have consented.
(4) The Federal Rules of Appellate Procedure apply to appeals on the record by consent from a magistrate to a district judge, except that:
(A) Consent to appeal on the record to a judge of this court must be in writing signed by the parties and filed with the clerk.
(B) A judge may waive the filing of briefs and a transcript and order any other exception which will make the appeal expeditious and inexpensive without substantial prejudice to the rights of any party.

(d) Stay Pending Appeal.

Application for a stay of a magistrate's order pending any appeal must first be made to the magistrate.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.4.

PAYMENT OF FIXED SUM IN LIEU OF APPEARANCE

(a) Forfeiture of Collateral.

(1) The payment of a sum fixed by court order may be accepted in suitable misdemeanor cases, in lieu of appearance, terminating the proceedings.
(2) The Court will by separate order identify the misdemeanors, fix the sum which may be paid in lieu of appearance, and may provide for increasing the penalties upon the failure of defendants to respond to a citation or notice.

(3) The Court's order is a public document available upon request in the office of the Clerk of Court.

(b) Mandatory Appearances.

(1) Payment of a fixed sum in lieu of appearance is not permitted:

(A) When the offense is aggravated and the defendant is cited or given notice to appear before a magistrate, or

(B) There are multiple offenses arising out of the same facts or sequence of events.

Comment: See the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and proposed Revised Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates.

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 50.5.

RECORDING PROCEEDINGS

(a) Court Reporters; Requests; Agreements of Parties.

(1) Requests that proceedings be taken down by a court reporter must be in writing filed with the Clerk not less than 5 business days before the date set for the proceedings or as soon as practicable if a proceeding is to be held with less than 5 days' notice to the parties.

(2) Agreements by the parties that the proceedings be recorded by means other than by a court reporter, or that no record of the proceedings be made must be in writing filed with the Clerk or announced in open court at the beginning of the proceedings.

Comment: Absent a request or an agreement by the parties, the magistrate will determine the method of recording the proceedings as provided by 28 U.S.C. § 636 (c)(7).

Editor's Note. — This rule was adopted by order dated February 14, 1980.

Rule 51.

[Rescinded]

Editor's Note. — This rule was adopted by order dated and effective September 17, 1971, and rescinded by order adopted May 13, 1977.

Rule 52.

FORFEITURE OF COLLATERAL SECURITY IN LIEU OF APPEARANCE

Pursuant to Rule 9, Rules of Procedure, United States magistrates, and in the interest of justice, good court administration and sound law enforcement, collateral may be posted in lieu of the appearance of the offender for certain petty offenses under federal statutes and regulations or state statutes made applicable by the Assimilative Crimes Statute (18 U.S.C. § 13), occurring within the jurisdiction of the United States magistrate, unless: (1) The offense is denominated as one for which appearance is mandatory or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

There shall be maintained in the office of the clerk and in the office of each United States magistrate, current lists of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be posted. These lists are not included in the court's printed rules because of their length, but shall be available to the public in the clerk's office upon request.

Upon the failure of the person charged with such offense or offenses to appear before the United States magistrate for trial, except those offenses denominated "mandatory appearance," and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any forfeitures of collateral for a traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses arising out of the same facts or sequence of events resulting in the original offense or offenses.

Editor's Note. — This rule was adopted by order dated Dec. 2, 1970, and was formerly designated Rule 36. It was renumbered Rule 52 by amendment adopted Sept. 17, 1971, effective Jan. 1, 1972.

Effect of Amendments. — The amendments adopted April 20, 1972 (rescinded by the amendment adopted Aug. 2, 1973), Aug. 2, 1973, and Nov. 8, 1973, made changes in the forfeiture-of-collateral schedule formerly set out in this rule.

The amendment adopted March 14, 1975, substituted "in the office of" for "with" preceding "each United States magistrate" in the first sentence and added the second sentence of the present last paragraph and deleted the former last paragraph, which included the forfeiture-of-collateral schedule.

The amendment adopted July 26, 1976, rewrote the first paragraph, substituting a reference to Rule 9, Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates for a reference to Rule 8, Rules of Procedure, United States Magistrates, and making other changes, rewrote the former last paragraph as the present second paragraph, substituting "lists" for "list" near the middle of the first sentence and "collateral may be posted in lieu of appearance" for "forfeiture of collateral security may be accepted" at the end of the first sentence and adding the language beginning "but shall be available" at the end of the second sentence. The amendment also substituted "such" for "an" preceding "offense" near the beginning of the first sentence of the present third paragraph, substituted "magistrate" for "magistrates" and deleted "of the offense or offenses listed below" following "trial" near the middle of that sentence, substituted "forfeitures" for "forfeiture" near the middle of the present fourth paragraph and deleted "not" preceding "arising" near the middle of the present last paragraph.

Appendix of Forms

Bankruptcy Forms

Forms 2-4

[Deleted]

Cross References. — For orders promulgated by the United States Bankruptcy Court for the Middle District of North Carolina pertaining to the effect on local bankruptcy rules and procedures of the Bankruptcy Rules promulgated by the U.S. Supreme Court on April 25, 1983, and effective August 1, 1983, see Appendix II (1A) of this volume.

Editor's Note. — Forms 2, 3 and 4 were deleted by amendment adopted March 14, 1975.

(1A) United States Bankruptcy Court for the Middle District of North Carolina

As Amended to Aug. 5, 1983.

Editor's Note. — This appendix sets forth orders of the United States Bankruptcy Court for the Middle District of North Carolina. The orders pertain to the effect on local bankruptcy rules and procedures of the Bankruptcy Rules adopted by the U.S. Supreme Court on April 25, 1983, and effective August 1, 1983. The Bankruptcy Rules adopted by the U.S. Supreme Court are set forth in Volume 103, No. 14, of the Supreme Court Reporter.

ORDERS PROMULGATED BY THE BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:	)	
	)	
	)	
RULES OF PRACTICE AND PROCEDURE FOR THIS COURT	)	ORDER

It appearing that the United States Supreme Court has promulgated new Bankruptcy Rules, and the United States Congress not having objected thereto, thereby causing the 1983 Federal Rules of Bankruptcy Procedure to be effective and binding upon all federal Bankruptcy Courts beginning August 1, 1983,

IT IS ORDERED that all local rules promulgated by this Court prior to August 1, 1983 be and hereby are RESCINDED.

At Greensboro, in said District, this the 5th day of August, 1983.

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:	)	
	)	
	)	
RULES OF PRACTICE AND PROCEDURE FOR THIS COURT	)	ORDER

Pursuant to the authority of 28 U.S.C. 2701, the Federal Rules of Civil Procedure, the Bankruptcy Code and the Bankruptcy Rules, and for good cause appearing therefore, IT IS ORDERED THAT

The 1983 Federal Rules of Bankruptcy Procedure be and hereby are supplemented as follows:

1. The following language is added to Rule 4003(a):

"Except in unusual circumstances, the Debtor in a Chapter 7 case should file a claim for exempt property pursuant to Section 522(b) (1)

of the Bankruptcy Code, if at all, on Form 91-C, which is available in the Clerks Office of this Court; the Debtor's filing of Form 91-C must be referenced in Schedule B-4 of the Debtor's schedules."

2. The following language is inserted between the first and second sentences of Rule 4003(b):

"The Court may grant any party in interest an extension of time for objecting to the Debtor's claim of exempt property only upon that party's application setting forth reasons for the extension request, such notice as the Court deems appropriate under the circumstances, and order of the Court."

At Greensboro, in said District, this the 5th day of August, 1983.

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

IN THE MATTER OF:	)	
	)	
	)	
RULES OF PRACTICE AND PROCEDURE FOR THIS COURT	)	ORDER

Pursuant to the authority of 28 U.S.C. 2701, the Federal Rules of Civil Procedure, the Bankruptcy Code and the Bankruptcy Rules, and for good cause appearing therefore, and

It appearing that Bankruptcy Rule 3003(c) (2) requires any creditor whose claim is listed in a Chapter 11 case as disputed, contingent, or unliquidated as to amount, to file a proof of claim in order to be treated as a creditor for purposes of voting and distribution; and

It also appearing that an order is entered upon the filing of a Chapter 11 petition which requires each creditor whose claim is listed as disputed, contingent, or unliquidated to file a proof of claim within ninety (90) days or be barred from voting or participation in the case; and

It also appearing that a significant burden is placed upon creditors to determine whether their claims are listed as disputed, contingent, or unliquidated, and that knowledge of such fact is necessary to enable each creditor so listed to advance its claim in a Chapter 11 case; therefore,

IT IS ORDERED as a local rule of this Court, that from this time forward, the debtor shall notify each creditor whose claim is listed on the petition as contingent, disputed, or unliquidated of that fact within fifteen (15) days after filing the schedule of assets and liabilities or within fifteen (15) days after addition of such creditors to the petition.

IT IS FURTHER ORDERED that failure to notify a creditor that its claim is listed as disputed, contingent, or unliquidated shall result in the creditor's claim being deemed filed in the amount listed as disputed, contingent, or unliquidated, as though a proof of claim had been filed by the creditor.

At Greensboro, in said District, this the 5th day of August, 1983.

(2) United States District Court for the Eastern District of North Carolina

As Amended to July 15, 1983.

United States District Court
Eastern District of North Carolina
Chambers of the Chief Judge

IN THE MATTER OF RULES OF PRACTICE FOR THE EASTERN DISTRICT OF NORTH CAROLINA]	ORDER PURSUANT TO 28 U.S.C. §2071, §83 F.R. CIV. P., AND §57 F.R. CRIM. P.

Pursuant to Section 2071 of Title 28, United States Code, Rule 83, Federal Rules of Civil Procedure and Rule 57, Federal Rules of Criminal Procedure, the following are promulgated as the Rules of Practice for handling matters in the United States District Court for the Eastern District of North Carolina, effective October 1, 1980.

This 25th day of July, 1980.

/s/ F. T. DUPREE, JR.
Chief District Court Judge

/s/ JOHN D. LARKINS, JR.
Senior District Court Judge

/s/ W. EARL BRITT
District Court Judge

PREFACE

The Rules of Practice here promulgated are the product of a project begun by Senior District Court Judge John D. Larkins, Jr., during his last year as Chief Judge of this court. Many persons, lay and professional, have contributed to their content. It is hoped that they will prove to be as successful in application as were the rules they replace.

The rules replaced by these rules were promulgated by Chief District Court Judge Algernon L. Butler, Jr., in 1961. Those who have used Judge Butler's rules are aware of how effectively they served to facilitate the business of the court. They were well-reasoned, practical rules that simplified and made easier the administration of justice.

As Judge Butler recognized in 1961, "rules of court must inevitably change if they are to keep pace with our social, economic and political development." It was with this in mind that Judge Larkins appointed a special committee chaired by Hon. Charles B. Winberry, Jr., of Rocky Mount to study and recommend new rules for handling matters in the Eastern District of North Carolina. That committee, with helpful contributions from the United States' Attorney and his staff, the Clerk and his staff, lay-persons affiliated with the court and the bar at large, spent almost two years preparing that which follows. The Court is grateful for the time and effort expended by them in their undertaking.

It is intended that these rules serve to expedite the business of the court and to conserve time and resources. Where there is uncertainty they shall be so interpreted and applied.

Mindful that the passage of time will require changes, the Court will welcome suggestions from those using the rules and from time to time will publish amendments.

/s/ F. T. DUPREE, JR.
Chief District Court Judge

Raleigh, North Carolina
July 25, 1980

Local Rules of Practice and Procedure of the United States District Court for the Eastern District of North Carolina

Effective August 1, 1980

As Amended to July 15, 1983.

I. General Rules
II. Civil Rules
III. Criminal Rules
IV. Magistrates
V. Admiralty and Maritime Claims

APPENDIX
A. Plan for Achieving Prompt Disposition of Criminal Cases

Rules of Court

I. General Rules

RULE 1.00. SCOPE AND CITATION OF LOCAL RULES.
RULE 2.00. ATTORNEYS.
2.01. Roll of Attorneys.
2.02. Eligibility.
2.03. Procedure for Admission.
2.04. Representation by Local Counsel Who Must Sign All Pleadings.
2.05. Appearances by Attorneys Not Admitted in the District.
2.06. Pleadings, Service and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.
2.07. Withdrawal of Appearance.
2.08. Courtroom Decorum.
2.09. Questioning of Witnesses.
2.10. Professional Standards.
RULE 3.00. COURT SCHEDULE AND CONDUCT OF BUSINESS.
3.01. Headquarters of the Clerk.
3.02. Divisions of the District.
3.03. Assignment of Cases to a Division.
3.04. Court in Continuous Session.
3.05. Place and Time of Holding Court.
3.06. Correspondence.
3.07. Form of Pleadings, Motions and Documents.
3.08. Filing and Service of Papers.
3.09. Discovery Materials Not to Be Filed Unless Ordered or Needed.
RULE 4.00. MOTION PRACTICE.
4.00. Time for Filing.
4.01. General Requirements.
4.02. Motions Relating To Discovery and Inspection.
4.03. Supporting Memoranda.
4.04. Responses to Motions.
4.05. Replies.
4.06. Affidavits.
4.07. Hearings on Motions.
4.08. Frivolous or Delaying Motions.
RULE 5.00. SUPPORTING MEMORANDA.
5.01. Form and Content.
5.02. Citation of Published Decisions.
5.03. Citation of Decisions Not Appearing in Certain Published Reports.
5.04. Citation of Unpublished Decisions.
RULE 6.00. JURORS.
6.01. Jury Lists.
6.02. Examination of Jurors.
6.03. Contact With Trial Jurors.
RULE 7.00. RELEASE OF INFORMATION TO NEWS MEDIA.
7.01. Court Personnel.
7.02. Copies of Public Records.
7.03. Criminal Matters.
RULE 8.00. PHOTOGRAPHING AND REPRODUCING COURT PROCEEDINGS.
RULE 9.00. POWERS AND DUTIES OF THE CLERK.
9.01. Approval of Security.
9.02. Seizure of Person or Property.

RULE
9.03. Orders and Judgments.
9.04. Handling of Exhibits.
9.05. Deposit of Registry Funds in Interest-Bearing Accounts.
9.06. Central Violations Bureau.
9.07. Court Libraries.
9.08. Jurisdictional Agreements with Other Courts.
RULE 10.00. SURETIES.
10.01. Security.
10.02. Use of Real Property as Security.
10.03. Prohibited Sureties.
RULE 11.00. CIVIL RIGHTS ACTIONS BY PRISONERS, 42 U.S.C. § 1983.
RULE 12.00. HABEAS CORPUS ACTIONS (28 U.S.C. § 2254) AND 28 U.S.C. § 2255 MOTIONS.
RULE 13.00. STUDENT PRACTICE RULE.
13.01. Compliance with Rule.
13.02. Eligibility.
13.03. Supervising Attorney.
13.04. Certification of Student and Supervisor.
13.05. Activities.
RULE 14.00. NATURALIZATION.
RULE 15.00. SANCTIONS.
RULES 16.00 to 19.00: [Reserved.]

II. Civil Rules

RULE 20.00. MINORS AND INCOMPETENTS AS PARTIES.
20.01. Representation.
20.02. Settlement or Dismissal of Actions.
20.03. Approval of Counsel Fees and Payment of Judgments.
RULE 21.00. CONSENT OF PARTIES TO CIVIL TRIAL JURISDICTION OF MAGISTRATES (28 U.S.C. § 636(c)).
RULE 22.00. [Repealed.]
RULE 23.00. DISCOVERY CONFERENCE, RULE 26(f), F.R. CIV. P.
RULE 24.00. CIVIL DISCOVERY.
24.01. Conducting Discovery.
24.02. Numbering Discovery Procedures.
24.03. Form of Interrogatories, Responses and Objections.
24.04. Depositions for Use at Trial.
RULE 25.00. FINAL CIVIL PRE-TRIAL CONFERENCE.
25.01. Scheduling and Notice.
25.02. Preparation by Counsel for Final Pre-Trial Conference.
25.03. Form of Pre-Trial Order.
25.04. Pre-Trial Conference.
25.05. Form of Pre-Trial Order.
RULE 26.00. ATTORNEY PREPARATIONS FOR CIVIL TRIAL.
26.01. In All Cases.
26.02. In Jury Cases.
26.03. In Non-Jury Cases.
26.04. Late Development in the Case.
RULE 27.00. CIVIL TRIALS.
27.01. Opening Statements.
27.02. Witnesses.
27.03. Exhibits.
27.04. Closing Argument.
27.05. Taking Verdicts and Polling the Jury.
RULE 28.00. CIVIL CONTEMPT.
28.01. Rights of Contemnor.
28.02. Summary Contempt Proceedings.
28.03. Plenary Contempt Proceedings.
RULES 29.00 to 39.00: [Reserved.]

III. Criminal Rules

RULE 40.00. PROMPT DISPOSITION OF CRIMINAL CASES.
RULE 41.00. WAIVER OF APPEARANCE IN MISDEMEANOR CASES, RULE 43(c)(2), F.R. CRIM. P.
RULE 42.00. ARRAIGNMENT.
RULE 43.00. CRIMINAL PRE-TRIAL DISCOVERY AND INSPECTION.
43.01. Criminal Pre-Trial Conference.
43.02. Further Discovery or Inspection.
43.03. Duty of Disclosure.
RULE 44.00. TIME PERIOD FOR FILING PRE-TRIAL MOTIONS IN CRIMINAL CASES.
RULE 45.00. PUBLICITY IN CRIMINAL MATTERS.
45.01. Statements By One Participating in or Associated with an Investigation.
45.02. Statements after Filing of Complaint, Information, or Indictment, Issuance of Warrant or Arrest.
45.03. Statements That Can Be Made.
45.04. Statements during Jury Selection or Trial.
45.05. Statements after Trial, Disposition without Trial or Sentencing.
45.06. Statements of Staff and Employees.
RULE 46.00. PETITION FOR DISCLOSURE OF PRESENTENCE OR PROBATION RECORDS.
RULE 47.00. TIME OF ISSUANCE OF SUBPOENAS IN CRIMINAL CASES.

RULES 48.00 to 59.00: [Reserved.]

IV. Magistrates

RULE 60.00. STANDARDS OF PERFORMANCE.
RULE 61.00. ASSIGNMENT OF MATTERS TO MAGISTRATES.
61.01. Criminal Cases.
61.02. Civil Cases.
61.03. General.
RULE 62.00. AUTHORITY OF MAGISTRATES.
62.01. Duties Under 28 U.S.C. § 636(a).
62.02. Disposition of Misdemeanor Cases — 18 U.S.C. § 3401.
62.03. Determination of Non-Dispositive Pretrial Matters — 28 U.S.C. § 636(b)(1)(A).
62.04. Recommendations Regarding Case-Dispositive Motions — 28 U.S.C. § 636(b)(1)(B).
62.05. Prisoner Cases under 28 U.S.C. § 2254 and § 2255.
62.06. Prisoner Cases under 42 U.S.C. § 1983.
62.07. Special Master References.
62.08. Conduct of Trials and Disposition of Civil Cases upon Consent of the Parties — 28 U.S.C. § 636(c).
62.09. Other Duties.
RULE 63.00. REVIEW AND APPEAL.
63.01. Appeal of Non-Dispositive Matters — 28 U.S.C. § 636(b)(1)(A).
63.02. Review of Case-Dispositive Motions and Prisoner Litigation — 28 U.S.C. § 636(b)(1)(B).
63.03. Special Master Reports — 28 U.S.C. § 636(b)(2).
63.04. Appeal from Judgments in Misdemeanor Cases — 18 U.S.C. § 3402.
63.05. Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties — 28 U.S.C. § 636(c).
63.06. Appeals from other Orders of a Magistrate.
RULES 64.00 to 79.00: [Reserved.]

V. Admiralty and Maritime Claims

RULE 80.00. TITLE AND SCOPE.
RULE 81.00. RETURN OF PROCESS.
RULE 82.00. PUBLICATION.
RULE 83.00. PUBLICATION OF NOTICE OF SALE.
RULE 84.00. STIPULATIONS FOR COSTS AND SECURITY.
RULE 85.00. FORM OF STIPULATIONS.
RULE 86.00. PLEADINGS AND PARTIES.
RULE 87.00. VERIFICATION OF PLEADINGS AND ANSWERS TO INTERROGATORIES.
RULE 88.00. INTERVENTION.
RULE 89.00. APPRAISEMENT AND APPRAISERS AND OTHER MATTERS.
RULE 90.00. RELEASE OF SEIZURES — CUSTODIAL COST — GENERAL BONDS.
RULE 91.00. TAXATION OF COSTS.
RULE 92.00. STAY OF EXECUTION OR OF RELEASE OF PROPERTY AFTER JUDGMENT OR DISMISSAL.
RULE 93.00. POSSESSORY ACTIONS — SHORT DAY RETURN.
RULE 94.00. CLAIMS AFTER SALE, HOW LIMITED.
RULES 95.00 to 99.00: [Reserved.]

Appendix A

Plan for Achieving Prompt Disposition of Criminal Cases for the Eastern District of North Carolina — Statement of Time Limits and Procedures

Preamble
II. Time Limits Adopted by the Court.
Preamble.
1. Applicability.
2. Priorities in Scheduling Criminal Cases.
3. Time within Which an Indictment or Information Must Be Filed.
4. Time within Which Trial Must Commence.
5. Defendants in Custody and High-Risk Defendants.
6. Exclusion of Time from Computations.
7. Minimum Period for Defense Preparation.
8. Time within Which Defendant Should Be Sentenced.
9. Juvenile Proceedings.
10. Sanctions.
11. Persons Serving Terms of Imprisonment.
12. Effective Dates.

I. General Rules

Rule 1.00 Scope and Citation of Local Rules.

These local rules of practice shall govern the conduct of the United States District Court for the Eastern District of North Carolina except when the conduct of this court is governed by federal statutes and rules. A judge or magistrate, for good cause and in his discretion, may alter these rules in any particular case. These rules shall be cited: "Local Rule _____, EDNC".

Rule 2.00 Attorneys.

2.01: *Roll of Attorneys.* The bar of this court consists of those heretofore admitted and those hereafter admitted as prescribed by this Local Rule 2.00.

2.02: *Eligibility.* A member in good standing of the bar of the Supreme Court of North Carolina, who resides in the State of North Carolina and who maintains an office in the State of North Carolina, is eligible for admission to the bar of this court.

2.03: *Procedure for Admission.* Before being presented to the court for taking the required oath, an applicant for admission shall certify in a written application that such applicant:

(a) Is a member in good standing of the bar of the Supreme Court of North Carolina, a resident of North Carolina, and maintains an office in North Carolina; and,

(b) Has studied the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, and the Local Rules of this court.

In addition to these certifications, the written application shall contain the certification of two attorneys who are members in good standing of the bar of this court that the applicant is of good moral character and professional reputation and meets the requirements for admission. An applicant may be admitted to practice in this court by a judge or magistrate upon oral motion by a member of the bar of this court. If the motion for admission is granted, the applicant shall take the following oath or affirmation:

> I do solemnly swear that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney of this court, uprightly and according to law. So help me God.

Following the administration of the oath, the application shall be signed by the judge or magistrate and the applicant shall file the application, accompanied by a fee of $25.00, with the clerk. The clerk shall then issue the applicant a certificate of admission to the bar of this court. Upon the filing of a properly certified and executed application accompanied by the admission fee of $25.00, the clerk may accept for filing papers signed by the applicant. However, no applicant shall make an appearance on behalf of a client until the applicant has taken the oath.

2.04: *Representation by Local Counsel Who Must Sign All Pleadings.* Litigants in civil and criminal actions, except governmental agencies and parties appearing *pro se*, must be represented by at least 1 member of the bar of this court, who shall sign each pleading, motion, discovery procedure or other document filed in this court.

2.05: *Appearances by Attorneys Not Admitted in the District.* Any person who is a member in good standing of the bar of a United States District Court and the bar of the highest court of any state or the District of Columbia shall be permitted to appear in a particular matter in association with a member of

the bar of this court. The appearance of such a person in a particular matter shall confer jurisdiction upon this court for any alleged misconduct of that person or for any other purpose arising in the course of or in the preparation of such matter.

2.06: *Pleadings, Service, and Attendance by Local Counsel in Cases Where Out-of-State Attorneys Appear.* Pleadings and other documents filed in a case where an attorney appears who is not admitted to the bar of this court shall contain the individual name, firm name, address, and phone number of both the attorney making a special appearance under this Local Rule and the associated local counsel. In such a case, the service of all pleadings and notices as required shall be sufficient if served only upon the associated local counsel. Unless excused by the court, the associated local counsel shall be present at all pre-trial conferences, hearings and trials and may attend discovery proceedings.

2.07: *Withdrawal of Appearance.* No attorney whose appearance has been entered shall withdraw his or her appearance or have it stricken from the record, except with leave of the court.

2.08: *Courtroom Decorum.* Counsel shall conduct themselves with dignity and propriety. Counsel shall rise when addressing the court, and all statements to the court shall be made from counsel table or from behind the lectern facing the court. Counsel shall not approach the bench unless requested to do so by the court or unless permission is granted upon the request of counsel.

2.09: *Questioning of Witnesses.* Only one attorney for each party may question a particular witness unless the court allows otherwise. Counsel shall remain seated while questioning witnesses.

2.10: *Professional Standards.* The ethical standard governing the practice of law in this court is the Code of Professional Responsibility of the North Carolina State Bar, Incorporated now in force and as hereafter modified by the Supreme Court of North Carolina, except as may be otherwise provided by specific rule of this court. Counsel are directed to advise the Clerk within 10 days of disciplinary action taken against them resulting in suspension or disbarment. The disciplinary procedures of this court shall be on file with the clerk and furnished to counsel upon request.

Rule 3.00 Court Schedule and Conduct of Business.

3.01: *Headquarters of the Clerk.* The headquarters of the clerk of the court shall be in Raleigh.

3.02: *Divisions of the District.* There shall be six divisions of this court. Headquarters of each division and the counties comprising each division are as follows:

NAME OF DIVISION	*HEADQUARTERS*	*COUNTIES*	
Elizabeth City Division	Elizabeth City	Bertie	Hertford
		Camden	Pasquotank
		Chowan	Perquimans
		Currituck	Tyrrell
		Dare	Washington
		Gates	
Fayetteville Division	Fayetteville	Cumberland	Sampson
		Robeson	
New Bern Division	New Bern	Beaufort	Lenoir
		Carteret	Martin
		Craven	Onslow
		Hyde	Pamlico
		Jones	Pitt

NAME OF DIVISION	*HEADQUARTERS*	*COUNTIES*	
Raleigh Division	Raleigh	Franklin	Vance
		Granville	Wake
		Harnett	Warren
		Johnston	
Wilmington Division	Wilmington	Bladen	Duplin
		Brunswick	New Hanover
		Columbus	Pender
Wilson Division	Wilson	Edgecombe	Northhampton
		Greene	Wayne
		Halifax	Wilson
		Nash	

3.03: *Assignment of Cases to a Division.*

(a) *Civil Actions.* The clerk shall assign all civil actions to a division when the action is filed or removed. If one or more plaintiffs are residents of this District, the clerk shall assign the case to the division in which the first named such plaintiff resides. If no plaintiff resides in the District and one or more defendants reside in the District, the clerk shall assign the action to the division in which the first named such defendant resides. In the event no party resides in the District but the claim is alleged to have arisen in the District or to involve real property in the District, the clerk shall assign the action to the division in which such claim is alleged to have arisen or in which the real property is situate. In all other instances, a case shall be assigned to a division in the discretion of the clerk.

(b) *Criminal Actions.* The clerk shall assign all criminal indictments to a division when an indictment is filed or transferred. If the indictment alleges the crime occurred within the District, the clerk shall assign the action to the division in which the crime is alleged to have occurred. In cases where it is not alleged that the crime occurred in the District or in cases in which it is unclear in which division the alleged crime occurred, the clerk shall assign the indictment to the division in which the first named defendant, who resides within this District, resides. In all other instances, an indictment shall be assigned to a division in the discretion of the clerk.

(c) *Residence of Corporation.* For the purposes of this local rule, a corporate plaintiff shall be deemed to reside in the state in which it was incorporated and in the district and division in which it has its principal office; and, a corporate defendant shall be deemed to reside in the division in which the corporation is alleged to (1) be incorporated and have its principal office, or (2) be licensed to do business or (3) be doing business.

(d) *United States as Plaintiff.* For the purposes of this local rule, in cases where the United States, its agencies or officers acting in an official capacity, is the plaintiff it shall be deemed that such plaintiff does not reside in this district.

3.04: *Court in Continuous Session.* The court shall be in continuous session in all divisions of the District on all business days throughout the year. All matters of either a criminal or civil nature not reached at the regular sessions of court are deemed to be in an open status and subject to being called for disposition before the next regular session of court upon reasonable notice to the interested parties.

3.05: *Place and Time of Holding Court.* Regular or special sessions of court, motion days, pre-trial conferences and other court business will be conducted at a place designated by the court. On the opening day of a session, court shall begin at 10:00 a.m.; on all other days, unless the presiding judge shall otherwise direct, court shall begin at 9:30 a.m.

3.06: *Correspondence.* Correspondence addressed to the court shall indicate that copies have been transmitted to all other parties and failure to transmit

the same to all other parties may result in sanctions by the court. Such correspondence shall not become a part of the record in the case.

3.07: *Forms of Pleadings, Motions and Documents.* All pleadings, motions, discovery procedures, memoranda and other papers filed with the clerk or the court shall:

(a) After July 1, 1982, be on standard letter size (8½ x 11) paper; prior to that date, either legal or letter size paper will be accepted;

(b) state the court and division in which the action is pending;

(c) bear, except for initial filings, the case number assigned by the clerk;

(d) contain the caption of the case;

(e) if applicable, state the title of the pleading, motion, discovery procedure or document and the federal statute or rule number under which the party is proceeding;

(f) contain the individual name, firm name, address and telephone number of all attorneys who appear for the filing party, including an attorney making a special appearance pursuant to Local Rule 2.05;

(g) bear the date when signed by counsel;

(h) be signed by counsel as required by Local Rule 2.04; and

(i) on all documents, the signature of parties and counsel shall be followed, on the line immediately below, by the typed or printed name in the exact form as the signature. In preparation of documents for signature by a judge or magistrate, a blank space shall be provided below the signature line in which the name may be typed or printed; and

(j) have each page numbered sequentially. The following forms are examples to be followed:

The United States District Court
for the Eastern District of North Carolina
Wilmington Division

NO: _____-_____-_____

(Civil)

JAMES T. SMITH,
Plaintiff
vs.
AARON T. JONES, et al
Defendants

OFFER OF JUDGMENT
Rule 68, F.R. Civ. P.

OR

(Criminal)

UNITED STATES OF AMERICA
vs.
AARON T. JONES,
Defendant

MOTION TO TRANSFER PROCEEDING
Rule 21(a), F.R. Crim. P.

(Closing)

This _____ day of January, 1980.

(signature)

John B. Counselor,
Attorney for the Defendant
Abbot, Ball and Counselor
Attorneys at Law
200 Main Street
Post Office Box 50
Raleigh, North Carolina 27602
A/C (919) 878-8787

OF COUNSEL:
James M. Jones
Attorney for the Defendant
Jones, Jones and Jones
Attorneys at Law
1000 Broadway
Post Office Box 500
New York, New York 10050
A/C (212) 555-1212

3.08: *Filing and Service of Papers.* Unless otherwise specifically provided for, the original of all pleadings and other papers required to be filed or served shall be filed with the clerk in the office of the clerk in Raleigh, Fayetteville, New Bern or Wilmington regardless of the division to which the case is assigned. When the law requires a proceeding to be heard and determined by a district court of three judges, pleadings and other documents shall be filed in triplicate. In all cases, whenever a pleading (subsequent to the complaint) or other paper is required to be filed with the clerk or with the court, a copy thereof shall be served upon opposing parties as provided in Rule 5(b), F.R. Civ. P.

3.09: *Discovery Materials Not to Be Filed Unless Ordered or Needed.* Depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto are not to be filed unless on order of the Court or for use in the proceeding. All such papers must be served on other counsel or parties entitled to service of papers filed with the Clerk. The party taking a deposition or obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or so ordered.

Only Part of Rule Set Out. — As the rest of the rule was not changed by the amendment, only section 3.09 is set out.

Effect of Amendments. — The amendment effective July 1, 1982, filed May 11, 1982, added section 3.09.

Rule 4.00 Motion Practice.

4.00: *Time for Filing.* All motions in civil cases except those relating to the admissibility of evidence at trial must be filed on or before 30 days following the conclusion of the period of discovery. If an extension of the original period of discovery is approved by the court, the time for filing motions is automatically extended to 30 days after the new date.

4.01: *General Requirements.* All motions shall be concise and shall state precisely the relief requested. Motions shall conform to the general motions requirements, standards and practices set forth in the applicable Federal Rules of Procedure and in Local Rule 3.07. Time for the filing of pre-trial motions in criminal cases is governed by Local Rule 44.00.

4.02: *Motions Relating to Discovery and Inspection.* No motions to compel discovery will be considered by the Court unless the motion sets forth, by item, the specific question, interrogatory, etc., objected to, along with the grounds supporting or in opposition to the objection. A discovery motion in a criminal action (Rule 16, F.R. Crim. P.) shall state that a request for discovery and inspection was made and denied.

4.03: *Supporting Memoranda.* Except for motions which the clerk may grant as specified in Local Rule 9.00, all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Rule 5.01. Where appropriate, motions shall be accompanied by affidavits or other supporting documents.

4.04: *Responses to Motions.* Any party may file a written response to any motion. The response may be a memorandum in the manner prescribed by Local Rule 5.01 and may be accompanied by affidavits and other supporting documents. When the response is not a memorandum, the written response shall be accompanied by a supporting memorandum in the manner prescribed by Local Rule 5.01 and, when appropriate, by affidavits and other supporting documents. Responses and accompanying documents shall be filed within 20 days after service of the motion in question unless otherwise ordered by the court or prescribed by the applicable Federal Rules of Procedure. In the event no response is filed, the court may proceed to rule on the motion.

4.05: *Replies.* Replies to responses are discouraged. However, a party desiring to reply to matters raised initially in a response to a motion or in accompanying supporting documents shall file the reply within 10 days after service of the response, unless otherwise ordered by the court.

4.06: *Affidavits.* Ordinarily, affidavits will be made by the parties and other witnesses and not by counsel for the parties. However, affidavits may be made by counsel for a party if the sworn facts are known to counsel or counsel can swear to them upon information and belief, and

(a) the facts relate solely to an uncontested matter; or

(b) the facts relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the facts; or

(c) the facts relate solely to the nature and value of the legal services rendered for the party by such counsel or counsel's law firm; or

(d) the refusal to accept the affidavit would work a substantial hardship on the party and the court finds that its acceptance of the affidavit would not be such as to require that counsel or counsel's law firm be disqualified from continuing to appear for the party.

4.07: *Hearings on Motions.* Hearings on motions may be ordered by the court in its discretion. Unless so ordered, motions shall be determined without hearing.

4.08: *Frivolous or Delaying Motions.* Where the court finds that a motion is frivolous or filed for delay, costs may be assessed against the party or counsel filing such motion.

Effect of Amendments. — The amendment filed Sept. 2, 1980, in Rule 4.07, deleted "dispositive" preceding "motions" and "upon the request for counsel" following "in its discretion" in the first sentence and substituted "so ordered" for "ordered by the court" in the second sentence.

Rule 5.00 Supporting Memoranda.

5.01: *Form and Content.* A memorandum shall be in the form prescribed by Local Rule 3.07 and shall contain:

(a) a concise summary of the nature of the case;

(b) a concise statement of the facts that pertain to the matter before the court for ruling;

(c) the argument (brevity is expected) relating to the matter before the court for ruling with appropriate citations in accordance with Local Rules 5.02, 5.03 and 5.04;

(d) copies of any decisions in cases cited as required by Local Rules 5.03, and 5.04; and

(e) where the supporting memorandum opposes a Motion for Summary Judgment a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

5.02: *Citation of Published Decisions.* Published decisions cited should include parallel citations, the year of the decision, and the court deciding the case. The following are illustrations:

(1) State Court Citation: *Rawls* v. *Smith,* 238 N.C. 162, 77 S.E. 2d 701 (1953).

(2) District Court Citation: *Smith* v. *Jones,* 141 F. Supp. 248 (E.D.N.C. 1956).

(3) Court of Appeals Citation: *Smith* v. *Jones,* 237 F. 2d 597 (4th Cir. 1956).

(4) United States Supreme Court Citation: *Smith* v. *Jones,* 325 U.S. 196, 65 S. Ct. 1120, 89 L. Ed. 1154 (1956). If a petition for certiorari or an appeal was filed in the United States Supreme Court, the disposition of the case in that court should always be shown with parallel citations. For example: *Carson* v. *Warlick,* 238 F. 2d 724 (4th Cir. 1956), *cert. denied,* 353 U.S. 910, 77 S. Ct. 665, 1 L. Ed. 2d 664 (1957).

5.03: *Citation of Decisions Not Appearing in Certain Published Reports.* Decisions published outside the West Federal Reporter System, the official North Carolina reports and the official United States Supreme Court reports (e.g., CCH Tax Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited if the decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed.

5.04: *Citation of Unpublished Decisions.* Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: *United States* v. *William Norman,* No. 74-50-CR(or CIV)-5 (E.D.N.C. January 7, 1975) and *United States* v. *Norman,* No. 74-2398 (4th Cir. June 27, 1975).

Rule 6.00 Jurors.

6.01: *Jury Lists.* When the jury for a session of the court is drawn, the clerk shall furnish a copy of the list to members of the bar of this court upon their request therefor. The list shall set out the name, address, occupation and employer of each juror and, where available, the name, address, occupation and employer of the spouse of each juror. The jurors and their families shall not be contacted, either directly or indirectly, in an effort to secure information concerning the background of any member of the jury panel. When the jurors are seated in the jury box, a chart or list shall be furnished by the clerk to the parties or their counsel, showing the name and seating assignment of each juror.

6.02: *Examination of Jurors.* The court shall conduct the examination of prospective jurors. Counsel shall file prior to trial a list of any *voir dire* questions counsel desires the court to ask the jury other than routine questions such as (1) the occupations and addresses of jurors and their spouses, (2) the identity

and relation of jurors, the parties, counsel and witnesses and (3) the knowledge of the jurors concerning the case.

6.03: *Contact with Trial Jurors.* Following the discharge of a jury from further consideration of a case, no attorney or party litigant shall individually or through an investigator or any person acting for such attorney or party litigant ask questions of or make comments to a member of that jury or the members of the family of such a juror that are calculated merely to harass or embarrass such a juror or a member of such juror's family or to influence the actions of such a juror or a member of such juror's family in future jury service.

Rule 7.00 Release of Information to News Media.

7.01: *Court Personnel.* All court personnel, including but not limited to, the Marshal and deputy marshal and office personnel, the clerk and deputy clerks and office personnel, probation officers and office personnel, bailiffs, court reporters, and the judges' and magistrates' office personnel, are prohibited from disclosing to any person, where it can reasonably be expected to be disseminated by means of public communication, without authorization of the court, information relating to any pending matter, civil or criminal, that has not been filed as a part of the public records of the court. This proscription applies to the divulgence of any information concerning arguments and hearings held in chambers or otherwise outside the presence of the jury or the public.

7.02: *Copies of Public Records.* The members of the news media and others may obtain copies of all public records from the clerk upon payment of copying fees.

7.03: *Criminal Matters.* In addition to the provisions of this Local Rule 7.00, the provisions of Local Rule 45.00 shall apply to all criminal matters.

Rule 8.00 Photographing and Reproducing Court Proceedings.

The taking of photographs in the courtroom, court offices or in the corridors immediately adjacent thereto, during judicial proceedings or during any recess of the court, and the transmitting or sound-recording of such proceedings for broadcasting by radio or television shall not be permitted. Proceedings designated and conducted as ceremonies, such as naturalization proceedings, the administration of oaths of office to officers of the court, presentation of portraits and other ceremonial occasions, may be photographed in or broadcast from the courtroom, with the permission and under the supervision of the court.

Rule 9.00 Powers and Duties of the Clerk.

9.01: *Approval of Security.* The clerk or deputy clerk is authorized to approve all recognizances, stipulations, bonds, guaranties, or undertakings, in the penal sum prescribed by statute or order of the court, whether the security be property, or personal or corporate surety.

9.02: *Seizure of Person or Property.* All acts and duties pertaining to the seizure of person or property as provided by the law of the State of North Carolina authorized to be done by a judge or the clerk of the state court may be done in like cases by a judge of this court or the clerk of this court, respectively.

9.03: *Orders and Judgments.* The clerk or a deputy clerk is authorized to enter the orders and judgments listed below without further direction of the court. However, such action may be suspended, altered or rescinded by the court for cause shown.

(a) Consent orders for the substitution of attorneys.

(b) Orders enlarging time periods in civil actions authorized to be entered by the court by Rule 6(b), F.R. Civ. P.

(c) Orders extending for a reasonable amount of time the period within which an act must be performed under the local rules of this court.

(d) Consent orders dismissing an action, except in bankruptcy proceedings and in cases to which Rule 23(c) F.R. Civ. P. and Rule 66, F.R. Civ. P. apply.

(e) Orders canceling liability on bonds.

(f) Orders changing the time of opening and adjourning court in the absence of the judge.

(g) Judgments by default as provided for in Rule 55(a) and 55(b)(1), F.R. Civ. P.

(h) Orders authorizing service of process by a person other than a United States Marshal pursuant to Rule 4(c), F.R. Civ. P.

(i) Certification of law students and supervising attorney pursuant to Local Rule 13.00.

(j) Any other motion, rule or order which may be granted of course or without notice.

(k) Pursuant to the provisions of 28 U.S.C. § 956, the clerk or a deputy clerk, when there is need to serve a complaint and attachment upon a vessel, or any other process incident to admiralty and maritime claims, either *in rem* or *in personam,* are empowered to grant and enter an order authorizing any sheriff or any deputy sheriff, or other suitable person, to serve all such process.

9.04: *Handling of Exhibits.* The clerk shall be the custodian of all exhibits admitted into evidence. Upon 10 days' notice by mail to counsel for all parties, the clerk may, within 30 days after the entry of final judgment, destroy or otherwise dispose of the exhibits.

9.05: *Deposit of Registry Funds in Interest-Bearing Accounts.* Whenever an order of court directs the clerk to place registry funds into interest-bearing accounts, counsel shall confer with the clerk, within 5 days after receipt of the order, concerning the manner and place of investment. If counsel and the clerk do not agree, the clerk shall seek further direction from the court. No officer or employee of this court shall incur any liability for failure to invest or for improper investment unless counsel have complied with their obligations under this local rule.

9.06: *Central Violations Bureau.* The clerk shall establish a Central Violations Bureau which shall be under the jurisdiction of the clerk and staffed by designated employees of the clerk. The bureau is authorized to perform all functions assigned to the Central Violations Bureau by Section XV, Disposition of Federal Petty Offenses by Mail, Volume IX-A, Guide to Judiciary Policies and Procedures. The Central Violations Bureau shall maintain a public listing of the petty offenses for which collateral may be posted in lieu of appearance and the amount of collateral required for each offense.

9.07: *Court Libraries.* The clerk shall maintain for the court and the general use of members of the bar of this court the court libraries in the District. Books shall not be removed from the library without the consent of the person responsible for the maintenance of the particular library, and shall not be removed from the courthouse under any circumstances. A violation of this rule shall be punishable as for contempt of court.

9.08: *Jurisdictional Agreements with Other Courts.* The clerk shall maintain all jurisdictional agreements entered into by the Chief District Judge of this court and the Chief District Judge of any other United States District Court and a copy of each such agreement and copies of such agreements shall be furnished to counsel upon request.

Rule 10.00 Sureties.

10.01: *Security.* Except as otherwise provided by law, every recognizance, stipulation, bond, guaranty, or undertaking shall be with security that consists of either (1) cash or negotiable government bonds, or (2) one or more sureties, as provided by law or the applicable Federal Rules of Procedure. A judge may enter pertinent orders restricting any bonding company or surety company from being accepted as surety upon any bond in any case or matter in this District.

10.02: *Use of Real Property as Security.* Whenever a surety seeks to justify assets by demonstrating ownership of real property, a judge or magistrate shall determine by satisfactory evidence that the property is of sufficient unencumbered value to protect the interests of the adverse party.

10.03: *Prohibited Sureties.* Members of the bar, administrative officers and employees of this court, and the Marshal and deputies and assistants thereto shall not act as surety in any matter, criminal or civil, pending in this court.

Rule 11.00 Civil Rights Actions By Prisoners, 42 U.S.C. § 1983.

All complaints on behalf of state prisoners seeking relief under 42 U.S.C. § 1983 and federal prisoners challenging conditions of confinement shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. An original and one copy of the complaint for the court and one copy of the complaint for each defendant named in the action shall be filed.

Rule 12.00 Habeas Corpus Actions (28 U.S.C. § 2254) and 28 U.S.C. § 2255 Motions.

All petitions on behalf of prisoners seeking relief under 28 U.S.C. §§ 2254 and 2255 shall be filed with the clerk in compliance with the instructions of the clerk and on the appropriate form available without charge. Such proceedings shall be governed by the rules promulgated by the United States Supreme Court.

Rule 13.00 Student Practice Rule.

13.01: *Compliance with Rule.* Students may participate as counsel in civil and criminal cases in this court subject to their compliance with all of the requirements of this Local Rule 13.00.

13.02: *Eligibility.* An eligible student must

(a) be duly enrolled in a law school;

(b) have completed at least 3 semesters of legal studies;

(c) have knowledge of the Federal Rules of Civil and Criminal Procedure, the Federal Rules of Evidence, the Code of Professional Responsibility, and the Local Rules of this court;

(d) be supervised by a supervising attorney as defined in Local Rule 13.03;

(e) be certified by the Dean of the Law School where the student is enrolled, or the Dean's designee, as being of good character, sufficient legal ability, and adequately trained to fulfill the responsibilities of a legal intern to both the client and the court;

(f) be certified by the court to practice pursuant to this Local Rule 13.00; and,

(g) decline personal compensation for his or her legal services from a client or any other source.

13.03: *Supervising Attorney.* A supervisor must:

(a) either (1) have faculty or adjunct faculty status at a law school at which a portion of the supervisor's duties includes supervision of students in a clinical program; or (2) be a member of the bar of this court for at least 2 years, who in the determination of the court, is competent to carry out the role of supervising attorney;

(b) be admitted to practice in this court;

(c) be certified by the court as a student supervisor;

(d) be present with the student at all times in court, and at other proceedings in which testimony is taken;

(e) co-sign all pleadings or other documents filed with the court;

(f) assume full personal and professional responsibility for a student's guidance and any work undertaken and for the quality of the student's work, and to be available for consultation with represented clients;

(g) assist and counsel the student in activities mentioned in Local Rule 13.05, and review such activities with the student, all to the extent required for proper practical training of the student and the protection of the client; and

(h) supplement oral or written work of the student as necessary to insure proper representation of the client.

13.04: *Certification of Student and Supervisor.*

(a) *Student.* The court's certification of a student to practice under this Local Rule 13.00 shall be filed with the clerk and shall remain in effect for 18 months or until the student graduates from law school, whichever is earlier. Certification to appear generally or in a particular case may be withdrawn by the court at any time, in the discretion of the court, and without any showing of cause.

(b) *Supervising Attorney.* Certification of the supervising attorney shall be filed with the clerk, and shall remain in effect indefinitely unless withdrawn by the court, in its discretion, and without any showing of cause.

13.05: *Activities.* A certified student may under the personal supervision of his or her supervisor:

(a) represent any client including federal, state or local governmental bodies, if the client on whose behalf the certified student is appearing has consented in writing to that appearance and the supervising lawyer has given written approval of that appearance;

(b) represent a client in any criminal, civil or administrative matter; however, the court retains the authority to limit a student's participation in any individual case;

(c) in connection with matters in this court, engage in other activities on behalf of the client in all ways that a licensed attorney may, under the general supervision of the supervising lawyer; however, a student shall make no binding commitments on behalf of a client absent prior client and supervisor approval, and in any matters, including depositions, in which testimony is taken the student must be accompanied by the supervising lawyer. Documents or papers which are filed shall be read, approved, and co-signed by the supervising lawyer. The court retains the authority to establish exceptions to such activities; and,

(d) prior to oral participation by a certified student in a hearing or trial, the supervising attorney shall provide the court with a written statement of the scope of participation anticipated on the part of the certified student.

Rule 14.00 Naturalization.

Petitions for naturalization will be considered and acted upon, and appropriate ceremonies conducted in connection therewith, on Wednesday of the first week of any regular session of Court at which naturalization hearings are set, beginning at 2:00 o'clock P.M., unless otherwise ordered by the court. The court may at other times, in its discretion, for good cause shown, and upon reasonable prior notice by the applicant to the Immigration and Naturalization Service,

consider and act upon petitions for naturalization by members of the armed services, seamen on merchant vessels registered under the laws of the United States, and members of the immediate families and dependents of such personnel, and in other exceptional cases.

Rule 15.00 Sanctions.

If an attorney or any party fails to comply in good faith with any local rule of this court, the court in its discretion may impose sanctions.

Rules 16.00 to 19.00: Reserved for future purposes.

II. Civil Rules

Rule 20.00 Minors and Incompetents as Parties.

20.01: *Representation.* Representation of minor and incompetent parties in a civil action shall be in accordance with Rule 17(c), F.R. Civ. P. Appointments of guardians *ad litem* by any state court shall satisfy the requirements of the Federal Rules of Civil Procedure unless the court finds that the interests of the parties so represented are not being adequately protected.

20.02: *Settlement or Dismissal of Actions.* No civil action to which a minor or incompetent person is a party shall be compromised, settled, discontinued, or dismissed without an Order of Approval entered by the court. It shall be the responsibility of counsel for the minor or incompetent parties to prepare a proposed Order of Approval for submission to the court. The Order of Approval shall bear the written consent of (1) counsel for all the parties to the action, (2) the legal representative of minor or incompetent parties, and (3), in the case of minors, at least one of the natural parents or persons standing *in loco parentis.* Unless otherwise ordered by the court, the Order of Approval shall contain statements as to the following:

(a) that all parties are properly represented and are properly before the court; that no questions exist as to misjoinder or nonjoinder of parties; and that the court has jurisdiction over the subject matter and the parties;

(b) if the minor or incompetent parties are plaintiffs, a summary of contentions sufficient to show that the complaint states a claim upon which relief can be granted; if the minor or incompetent parties are defendants, a statement of contentions sufficient to show that no affirmative defenses could clearly be raised in bar of recovery;

(c) a summary of services rendered by counsel for the minor or incompetent parties, along with an opinion as to the fairness and reasonableness of the settlement, if any; and

(d) in cases involving claims for personal injuries asserted by minor or incompetent parties, an estimate of actual and foreseeable medical, hospital and related expenses and a statement by an examining physician setting forth the nature and extent of the plaintiff's injuries, extent of recovery and prognosis.

20.03: *Approval of Counsel Fees and Payment of Judgments.* In its Order of Approval, the court shall approve or fix the amount of the fee to be paid to counsel for the minor or incompetent parties and make appropriate provision for the payment thereof. The Order of Approval shall also provide the manner in which judgments, if any, are to be paid and may make specific provisions for the payment of medical, hospital and similar expenses when allowed by applicable law.

Rule 21.00 Consent of Parties to Civil Trial Jurisdiction of Magistrates (28 U.S.C. § 636(c)).

(a) A plaintiff, desiring to consent to the civil trial jurisdiction of certified magistrates, shall file an executed consent not later than 20 days after the service by a defendant of the first answer or motion, whichever occurs first, following the institution of the action.

(b) A defendant, desiring to consent to the civil trial jurisdiction of certified magistrates, shall file an executed consent not later than 20 days after the filing of such defendant's first answer or motion, whichever occurs first, following the institution of the action.

(c) An additional party, joined in an action in which all parties have previously consented to magistrate jurisdiction, who desires to consent to the civil trial jurisdiction of certified magistrates, shall, within 10 days from the filing of the order allowing joinder, file such consent. If such additional party fails to so consent, the magistrate cannot exercise trial jurisdiction.

(d) The form of the consent shall be the manner prescribed by Local Rule 3.07, state the name of the consenting party, contain a statement that such party consents to invoke the civil trial jurisdiction of certified magistrates as provided by 28 USC § 636(c) and be dated and signed by counsel for the consenting party. The consent may be filed separately or it may be attached to any pleading or motion provided that such consent shall not be set out in such pleading or motion nor referred to therein. The clerk shall prepare a consent form which the clerk shall attach to all complaints and to orders joining additional parties prior to service.

(e) The clerk shall retain, in a private file to be maintained for this purpose, all executed consents. If all parties return such executed consents, they shall be placed in the record of the case and the civil trial jurisdiction of certified magistrates as provided by 28 USC § 636(c) shall be deemed to have been invoked.

(f) Appeals from the judgment of a magistrate shall be to the United States Court of Appeals for this circuit unless the parties stipulate at the time of consent that an appeal may be taken to a judge of this court. Such an appeal shall lie to the Chief Judge of this court or such other judge as may be designated by the Chief Judge of this court.

Rule 22.00 Repealed.

Rule 23.00 Discovery Conference, Rule 26(f) F.R. Civ. P.

A discovery conference may be held in every civil action at the earliest practicable date following the close of the pleadings in accordance with Rule 26(f), F.R. Civ. P. The conference shall be informal in nature and for the purpose of setting a preliminary plan and schedule for discovery, pre-trial conferences and trial. Subject to the provisions of Local Rule 2.06, counsel for all parties shall participate in the discovery conference.

Rule 24.00 Civil Discovery.

24.01: *Conducting Discovery.* In all civil actions, the parties shall schedule and conduct discovery in accordance with the order entered following the discovery conference, Rule 26(f), F.R. Civ. P. All discovery motions and requests shall be propounded so as to allow the respondent sufficient time to answer prior to the time when discovery is scheduled to be completed. To shorten discovery time, it is expected that discovery procedures will proceed concurrently. After the time for completing discovery has expired, further discovery may proceed only by order of the court and may, in no event, interfere with the conduct of either the final pre-trial conference or the trial.

24.02: *Numbering Discovery Procedures.* Each time a particular discovery procedure is used, it shall be sequentially numbered (e.g., "First Set", "Second Set", "First Request", "Second Request", etc.) so that it will be distinguishable from a prior procedure.

24.03: *Form of Interrogatories, Responses and Objections.* All interrogatories shall be served on opposing counsel. Three copies shall be served on counsel for the respondent. There shall be sufficient space following each question in which the respondent shall state the response. If the space provided is not sufficient, additional pages shall be attached. An objection to an interrogatory shall be made by stating the objection and the reason therefor in the space provided for the response. Before filing the interrogatories containing the responses and objections, if any, the responding party shall attach thereto a cover sheet containing a statement (1) that each response separately and fully answers each interrogatory, except those to which objections are made, and (2) the capacity, if any, in which such respondent is acting, which statement shall be signed and verified by the respondent. Where there are objections, there shall be attached to the interrogatories a second sheet, signed by counsel making such objection, stating the number of each such interrogatory and incorporating by reference the reason stated for each objection.

24.04: *Depositions for Use at Trial.* Depositions *de bene esse* shall not be regarded as being within the rules applicable to discovery.

Rule 25.00 Final Civil Pre-Trial Conference.

25.01: *Scheduling and Notice.* A final pre-trial conference shall be scheduled in every civil action after the time for discovery has expired. The clerk shall give at least 30 days' notice of such conference.

25.02: *Preparation by Counsel for Final Pre-Trial Conference.* At least 10 days prior to the final pre-trial conference, trial counsel for each of the parties shall confer and prepare a proposed final pre-trial order. It shall be the duty of counsel for the plaintiff to arrange for this conference. In the absence of an agreement to the contrary, the conference of attorneys shall be held in the office of the attorney nearest the headquarters of the division to which the action has been assigned. Each counsel shall bring to the conference copies of exhibits to be introduced into evidence, lists of witnesses to be called, and designations of discovery material to be used at trial.

25.03: *Form of Pre-Trial Order.* The pre-trial order shall be prepared in one sequential document without reference to attached exhibits or schedules and shall contain the following in five separate sections, numbered by roman numerals, as indicated:

(a) I. *Stipulations.* Stipulations covering jurisdiction, joinder, capacity of the parties, all relevant and material facts, legal issues and factual issues.

(b) II. *Contentions.* Contentions covering matters on which the parties have been unable to stipulate, including jurisdiction, misjoinder, capacity of the parties, relevant and material facts, legal issues and factual issues. Claims and defenses as to which no contentions are listed in the pre-trial order are deemed abandoned.

(c) III. *Exhibits.* A list of exhibits that each party may offer at trial, including any map or diagram, numbered sequentially, which numbers shall remain the same throughout all further proceedings. Copies of all exhibits shall be provided to opposing counsel not later than the attorney conference provided for in Rule 25.02. The court may excuse the copying of large maps or other exhibits. Except as otherwise indicated in the pre-trial order, it will be deemed that all parties stipulate that all exhibits are authentic and may be admitted into evidence without further identification or proof. Grounds for objection as to authenticity or admissibility must be set forth in the pre-trial order.

(d) IV. *Designation of Pleadings and Discovery Materials.* The designation of all portions of pleadings and discovery materials, including depositions, interrogatories and request for admissions that each party may offer at trial by reference to document volume, page number, and line. Objection by opposing counsel shall be noted by document volume, page number and line, and reasons for such objections shall be stated.

(e) V. *Witnesses.* A list of the names and addresses of all witnesses each party may offer at trial, together with a brief statement of what counsel proposes to establish by their testimony.

25.04: *Pre-Trial Conference.*

(a) *Purpose.* To resolve any disputes concerning the contents of the pre-trial order.

(b) Counsel shall be fully prepared to present to the court all information and documentation necessary for completion of the pre-trial order. Failure to do so shall result in the sanctions provided by this rule.

(c) *Sanctions.* Failure to comply with the provisions of Rule 25.04(b) may result in the imposition of a monetary fine not to exceed $250.00 against the offending counsel and may result in any other sanction allowable by the Federal Rules of Civil Procedure against the parties or their counsel.

(d) Counsel for plaintiff shall be responsible for preparing the final pre-trial order and presenting it to the court, properly signed by all counsel, at a time to be designated by the court. Upon approval by the court, the original shall be filed with the clerk.

25.05: *Form of Pre-Trial Order.* A pre-trial order in the following form shall be sufficient to comply with these rules:

JOHN DOE, by his guardian ad litem, JANE DOE Plaintiff	)	No. 82-1-CIV-8
v.	)	**PRE-TRIAL ORDER**
XYZ CORP. Defendant.	)	

Date of Conference: _____ August 1982.

Appearance: John Y. Lawyer, Raleigh, North Carolina, for plaintiff; Sam X. Attorney, Fayetteville, North Carolina, for defendant.

I. STIPULATIONS.

A. all parties are properly before the court;
B. the court has jurisdiction of the parties and of the subject matter;
C. all parties have been correctly designated;
D. there is no question as to misjoinder or nonjoinder of parties;
E. plaintiff, a minor, appears through her guardian;
F. **Facts:**
   1. Plaintiff is a citizen of Wake County, North Carolina.
   2. Defendant is a New York corporation, licensed to do business and doing business in the State of North Carolina.
G. **Legal Issues:**

May a 9-year old minor be guilty of contributory negligence?

H. **Factual Issues:**
   1. Was plaintiff injured and damaged by the negligence of the defendant?
   2. What amount, if any, is plaintiff entitled to receive of defendant as compensatory damages?

II. CONTENTIONS

A. Plaintiff

1. Facts:

(a) That Richard Roe was driving defendant's truck as defendant's agent.
(b) That Richard Roe was negligent in that he drove at an excessive speed and while under the influence of intoxicating liquor.

2. Factual Issues:

What amount, if any, is plaintiff entitled to recover of defendant as punitive damages?

B. Defendant

1. Facts:

That Richard Roe, a former employee, took defendant's truck without authorization and, at the time of the accident, was not the agent or employee of defendant.

2. Factual Issues:

Did plaintiff, by his own negligence, contribute to his injury and damage?

III. EXHIBITS

A. Plaintiff

Number	Title	Objection
1	Patrol Report	Hearsay
2	Photo of Plaintiff	

B. Defendant

Number	Title	Objection
1	Photo of Scene	
2	Scale Model	

IV. DESIGNATION OF PLEADINGS AND DISCOVERY MATERIALS

A. Plaintiff

Document	**Portion**	**Objection**	**Reason**
Plaintiff's first set of interrogatories	Nos. 1, 8 and 9	No. 8	Privilege
Deposition of Richard Roe	Vol. 1, line 6, p. 1, thru line 5, p. 6	Line 6, p. 1 thru line 2, p. 7	Hearsay

B. Defendant

None

V. WITNESSES

A. Plaintiff

Name	Address	Proposed Testimony
John Jones	615 Rains Street Raleigh, N.C.	Facts surrounding accident, extent of

Name	Address	Proposed Testimony
Frank Flake	Selma, N.C.	Speed of defendant's vehicle, intoxication driver
Joe Rock	Temple, Ariz.	

B. Defendant

All witnesses listed by plaintiff.

Name	Address	Proposed Testimony
Sam Smith	4 Appian Way Rome, Italy	Facts surrounding the theft by driver of the vehicle

Trial Time estimate: . . . . . days.

. . . . . .
JOHN Y. LAWYER
Counsel for Plaintiff

. . . . . .
SAM X. ATTORNEY
Counsel for Defendant

APPROVED BY:

. . . . . .
J. RICH LEONARD
Magistrate

. 1982

Rule 26.00 Attorney Preparations for Civil Trial.

On or before the Thursday preceding the first day of the session at which a civil action is set for trial, counsel for all parties shall file with the clerk:

26.01: *In All Cases.*

(a) A concise memorandum of authorities on all anticipated evidentiary questions and on all contested issues of law;

(b) motions relating to the admissibility of evidence.

26.02: *In Jury Cases.*

(a) a list of all voir dire questions as required by Local Rule 6.02;

(b) Requests for Jury Instructions. Those requests to Devitt & Blackmar (3d Ed.); 5th Circuit Pattern Instructions; and North Carolina Pattern Instructions shall be by reference. All other requests shall contain citations to supporting authorities.

26.03: *In Non-Jury Cases.* Proposed findings of fact and conclusions of law.

26.04: *Late Development in the Case.* Counsel shall immediately inform the court, opposing counsel and counsel in the next succeeding two cases on the calendar of any settlement or of any developments of an emergency which may necessitate a motion for continuance.

Rule 27.00 Civil Trials.

27.01: *Opening Statements.* At the beginning of the trial, each party (beginning with the party having the burden of proof on the first issue) shall, without argument and in such reasonable time as the court allows, state to the court and the jury the following:

(a) the substance of the claim, counterclaim, crossclaim or defense; and

(b) what counsel contends the evidence will show.

Parties not having the burden of proof on the first issue may elect to make an opening statement immediately prior to presenting evidence, rather than at the beginning of the trial.

27.02: *Witnesses.* Counsel may not release a person from a subpoena without notice to opposing counsel and leave of court. A party objecting to the release of a person shall bear all costs incident to such person which arise subsequent to the request for release. The court may, in its discretion and in the interest of justice, permit a party to call and examine a witness not listed in the final pre-trial order.

27.03: *Exhibits.*

(a) All exhibits shall be premarked with stickers obtained from the clerk's office with the sequential numbers as listed in the pre-trial order.

(b) Copies of all exhibits, properly bound, shall be provided to the court at the beginning of the trial.

(c) The original exhibit shall bear a sticker. After receipt into evidence, it shall remain in the custody of the courtroom deputy, except when being used by a witness or viewed by the jury.

(d) Copies of all exhibits shall bear the photostatic image of the sticker or a typed or printed reproduction thereof.

(e) Counsel are encouraged to provide one or more copies of exhibits for use by the jury.

(f) Upon presentation of an exhibit to a witness, counsel shall announce to the court the exhibit number. The exhibit shall not be handed to opposing counsel. Should opposing counsel contend that a copy has not been provided or that the exhibit has been lost or misplaced, that shall be brought to the attention of the court.

27.04: *Closing Argument.* The court will set the times for closing argument after consultation with parties. Unless otherwise ordered by the court, the party with the burden of proof shall open and close the arguments. The opening argument may not be waived.

27.05: *Taking Verdicts and Polling the Jury.* The court may take the verdict of the jury in open court in the absence of any party or counsel. Unless the contrary affirmatively appears of record, it will be presumed that the parties were present or by their voluntary absence waived their presence. The jury will not be polled unless a party requests a poll at the time the verdict is taken or unless a poll is ordered by the court.

Rule 28.00 Civil Contempt.

28.01: *Rights of Contemnor.* In all cases of civil contempt, the contemnor shall have due notice of the contempt charges, opportunity to reply to the charges and notice of the date and place of hearing in open court from which the public shall not be excluded.

28.02: *Summary Contempt Proceedings.* In contempt proceedings where the court may act summarily, the contemnor shall have the right to defend against the charges and to offer evidence in the form of affidavits. The movant shall have the right to offer the similar evidence.

28.03: *Plenary Contempt Proceedings.* In contempt proceedings where the court may not act summarily, the presentation of evidence is governed by Rule 1101 of the Federal Rules of Evidence. In no case of civil contempt, however, shall the parties be entitled to trial by jury, but rather the district judge before whom the matter is tried shall find the facts and enter a judgment or order in accordance with the provisions of the Federal Rules of Civil Procedure applicable to non-jury cases.

Rules 29.00 to 39.00: Reserved for future purposes.

III. Criminal Rules

Rule 40.00 Prompt Disposition of Criminal Cases.

The Plan for Achieving Prompt Disposition of Criminal Cases adopted by the Judges of this District is incorporated in these Local Rules by reference thereto as Appendix A.

Rule 41.00 Waiver of Appearance in Misdemeanor Cases, Rule 43(c)(2), F.R. Crim. P.

A defendant in misdemeanor cases may execute a written waiver of appearance which contains the following statements:

(a) the designation of counsel to appear in behalf of the defendant and the granting to such counsel of full authority to enter on behalf of the defendant a plea of guilty, not guilty, or nolo contendere to the offense charged, or to a lesser offense or offenses in lieu thereof;

(b) a consent to trial by the magistrate; and, a waiver of: (1) the right to be tried and sentenced by a district judge, (2) the right to a jury trial, (3) the right to testify in person, and (4) the right to face his or her accusers;

(c) an agreement to be bound by the decisions of the court as in any other case of adjudication and the entry of judgment subject to the right of appeal as in any other case; and,

(d) the circumstances which justify the approval of the written waiver of appearance by the court.

The waiver of appearance must (1) be in writing, (2) be signed by the defendant and his or her counsel, (3) be consented to by the United States Attorney or an Assistant United States Attorney and (4) be approved by the court.

Rule 42.00 Arraignment.

Ordinarily arraignments shall be conducted by magistrates under the provisions of Rule 19(B)(4), F.R. Crim. P. The presence of the United States Attorney at arraignment is not mandatory, and in the absence of the United States Attorney the magistrate shall conduct the arraignment in accordance with Rule 10, F.R. Crim. P. When a judge conducts the arraignment, the United States Attorney or an Assistant United States Attorney shall be present.

Rule 43.00 Criminal Pre-Trial Discovery and Inspection.

43.01: *Criminal Pre-Trial Conference.* Within 10 days after arraignment the United States Attorney shall arrange a pre-trial conference with counsel for the defendant. The pre-trial conference shall be held not later than 20 days after arraignment.

At the pre-trial conference and upon the request of counsel for the defendant, the government shall permit counsel for the defendant:

(a) to inspect and copy or photograph any relevant written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;

(b) to inspect and copy or photograph any relevant results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the case, or copies thereof, within the possession,

custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government;

(c) to inspect and copy or photograph any relevant recorded testimony of the defendant before a grand jury;

(d) to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places which is the property of the defendant and which are within the possession, custody or control of the government;

(e) to inspect and copy or photograph the Federal Bureau of Investigation Identification Sheet indicating defendant's prior criminal record; and

(f) to inspect, copy or photograph any exculpatory evidence.

Thereafter and upon the request of the government, counsel for the defendant shall:

(a) permit the United States Attorney to inspect and copy or photograph any document or other physical object intended to be introduced as an exhibit of the defendant at the trial;

(b) permit the United States Attorney to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular cases, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to the testimony of such witness; and

(c) disclose the substance of any alibi or similar defense intended to be presented by the defendant.

43.02: *Further Discovery or Inspection.* In the event that either party thereafter moves to compel compliance with Local Rule 43.01 or for additional discovery or inspection, such motion shall be filed within 5 days of the pre-trial conference held pursuant to Local Rule 43.01 or such later date as may be set by the court for the filing of pre-trial motions. The motion shall contain:

(a) the statement that the prescribed conference was held;

(b) the date of said conference;

(c) the names of all counsel participating in the conference; and

(d) the statement that agreement could not be reached concerning the discovery or inspection that is the subject of the motion and the reasons given for the same.

43.03: *Duty of Disclosure:* Any duty of disclosure and discovery set forth in Local Rule 43.00 is a continuing one and the United States Attorney and counsel for the defendant shall produce voluntarily any additional relevant information gained by either of them.

Rule 44.00 Time Period for Filing Pre-Trial Motions in Criminal Cases.

All pre-trial motions, including but not limited to motions to suppress and motions under Rules 7, 12, 14, 16, and 41, F.R. Crim. P., shall be filed no later than 10 days after the pre-trial conference.

Rule 45.00 Publicity in Criminal Matters.

45.01: *Statements by One Participating in or Associated with an Investigation.* An attorney participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(a) information contained in a public record;

(b) that the investigation is in progress;
(c) the general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim;
(d) a request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto; and
(e) a warning to the public of any dangers.

45.02: *Statements after Filing Complaint, Information, or Indictment, Issuance of Warrant or Arrest.* An attorney or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication that relates to:
(a) the character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) for the accused;
(b) the possibility of a plea of guilty to the offense charged or to a lesser offense;
(c) the existence or contents of any confession, admission, or statement given by the accused or the refusal or failure of the accused to make a statement;
(d) the performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests;
(e) the identity, testimony, or credibility of a prospective witness; or
(f) any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

45.03: *Statements That Can Be Made.* This rule does not preclude an attorney during such period from announcing:
(a) the name, age, residence, occupation, and family status of the accused;
(b) if the accused has not been apprehended, any information necessary to aid in apprehension of the accused or to warn the public of any dangers the accused may present;
(c) a request for assistance in obtaining evidence;
(d) the identity of the victim of the crime;
(e) the fact, time, and place of arrest, resistance, pursuit, and use of weapons;
(f) the identity of investigating and arresting officers or agencies and the length of the investigation;
(g) at the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement;
(h) the nature, substance, or text of the charge;
(i) quotations from or references to public records of the court in the case;
(j) the scheduling or result of any step in the judicial proceedings; or
(k) that the accused denies the charges made against him.

45.04: *Statements during Jury Selection or Trial.* During the selection of a jury or the trial of a criminal matter, an attorney or a law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that the attorney may quote from or refer without comment to public records of the court in the case.

45.05: *Statements after Trial, Disposition without Trial, or Sentencing.* After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, an attorney or a law firm associated with the prosecution or defense shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be dissemi-

nated by public communication and that is reasonably likely to affect the sentence.

45.06: *Statements of Staff and Employees.* An attorney shall exercise reasonable care to prevent employees and associates from making an extra-judicial statement that the attorney would be prohibited from making under this Local Rule 45.00 and Local Rule 7.00.

Rule 46.00 Petition for Disclosure of Presentence or Probation Records.

No confidential records of this court maintained by the probation office, including presentence and probation supervision records, shall be sought by any applicant except by written petition to this court establishing with particularity the need for specific information in the records. Whenever a probation officer is served with a subpoena or other judicial process seeking the production or disclosure of pre-sentence and probation records and reports, the probation officer shall petition the Chief Judge of this court in writing for instructions with respect to responding to such process. In no event shall production or disclosure be made except pursuant to an order by a judge.

Rule 47.00 Time of Issuance of Subpoenas in Criminal Cases.

Subpoenas for witnesses in criminal cases shall be delivered to the Marshal or other person qualified to make service at least 7 days prior to the Monday of the week in which the case is set for trial. The failure of the Marshal or other qualified person to serve a subpoena not delivered within this time period shall not constitute sufficient cause for a continuance.

Rules 48.00 to 59.00: Reserved for future purposes.

IV. Magistrates

Rule 60.00 Standards of Performance.

In performing duties for the court, a magistrate shall conform to all applicable provisions of federal statutes and rules, to the Local Rules and procedures of this court, and to the requirements specified in any order of reference from a judge.

Rule 61.00 Assignment of Matters to Magistrates.

61.01: *Criminal Cases.*

(a) *Misdemeanor Cases.* Upon the filing of an information, complaint or violation notice, or the return of an indictment, all misdemeanor cases shall be assigned by the clerk to a magistrate, who shall proceed in accordance with the provisions of 18 U.S.C. § 3401 and the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates.

(b) *Felony Cases.* Upon the return of an indictment or the filing of an information, all felony cases shall be assigned by the clerk to a magistrate for the conduct of an arraignment and such pretrial conferences as are necessary, and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.04.

61.02: *Civil Cases.* Upon filing, all civil cases shall be assigned by the clerk to a magistrate for the conduct of such discovery and pretrial conferences as are

necessary and for the hearing and determination of all pretrial procedural and discovery motions, in accordance with Local Rule 62.03. Where designated by a judge, the magistrate may conduct additional pretrial conferences and hear the motions and perform the duties set forth in Local Rules 62.04, 62.05 and 62.06. Where the parties consent to trial and disposition of a case by a certified magistrate under Local Rule 21.00, such case shall, with the approval of the judge to whom it was assigned at the time of filing, be reassigned to a certified magistrate for the conduct of all further proceedings and the entry of judgment.

61.03: *General.* Nothing in these rules shall preclude a judge from reserving any proceeding for conduct by a judge, rather than a magistrate. The judge, moreover, may by order modify the method of assigning proceedings to a magistrate as changing conditions may warrant.

Rule 62.00 Authority of Magistrates.

62.01: *Duties under 28 U.S.C. § 636(a).* A magistrate is authorized to perform the duties prescribed by 28 U.S.C. § 636(a), and may:

(a) exercise all the powers and duties conferred or imposed upon United States commissioners by law and the Federal Rules of Criminal Procedure;

(b) administrator [administer] oaths and affirmations, impose conditions of release under 18 U.S.C. § 3146, and take acknowledgements, affidavits, and depositions; and

(c) conduct extradition proceedings, in accordance with 18 U.S.C. § 3184.

62.02: *Disposition of Misdemeanor Cases — 18 U.S.C. § 3401.*

A magistrate may:

(a) try persons accused of, and sentence persons convicted of, misdemeanors committed within this district in accordance with 18 U.S.C. § 3401;

(b) direct the probation service of the court to conduct a presentence investigation in any misdemeanor case; and

(c) conduct a jury trial in any misdemeanor case where the defendant so requests and is entitled to trial by jury under the Constitution and laws of the United States.

62.03: *Determination of Non-Dispositive Pretrial Matters — 28 U.S.C. § 636(b)(1)(A).* A magistrate may hear and determine any procedural or discovery motion or other pretrial matter in a civil or criminal case, other than the motions which are specified in Local Rule 62.04.

62.04: *Recommendations Regarding Case-Dispositive Motions — 28 U.S.C. § 636(b)(1)(B).*

(a) A magistrate may submit to a judge a report containing proposed findings of fact and recommendations for disposition by the judge of the following pretrial motions in civil and criminal cases:

1. Motions for injunctive relief, including temporary restraining orders and preliminary and permanent injunctions;
2. Motions for judgment on the pleadings;
3. Motions for summary judgment;
4. Motions to dismiss or permit the maintenance of a class action;
5. Motions to dismiss for failure to state a claim upon which relief may be granted;
6. Motions to involuntarily dismiss an action;
7. Motions for review of default judgments;
8. Motions to dismiss or quash an indictment or information made by a defendant; and
9. Motions to suppress evidence in a criminal case.

(b) A magistrate may determine any preliminary matters and conduct any necessary evidentiary hearing or other proceeding arising in the exercise of the authority conferred by this Local Rule 62.04.

62.05: *Prisoner Cases under 28 U.S.C. § 2254 and § 2255.* A magistrate may perform any or all of the duties imposed upon a judge by the rules governing proceedings in the United States district courts under 28 U.S.C. § 2254 and § 2255. In so doing, a magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for disposition of the petition by the judge. Any order disposing of the petition shall only be made by a judge.

62.06: *Prisoner Cases under 42 U.S.C. § 1983.* A magistrate may issue any preliminary orders and conduct any necessary evidentiary hearing or other appropriate proceeding and shall submit to a judge a report containing proposed findings of fact and recommendations for the disposition of petitions filed by prisoners challenging the conditions of their confinement.

62.07: *Special Master References.* A magistrate may be designated by a judge to serve as a special master in appropriate civil cases in accordance with 28 U.S.C. § 636(b)(2) and Rule 53, F.R. Civ. P. Upon the consent of the parties, a magistrate may be designated by a judge to serve as a special master in any civil case, notwithstanding the limitations of Rule 53(b), F.R. Civ. P.

62.08: *Conduct of Trials and Disposition of Civil Cases upon Consent of the Parties — 28 U.S.C. § 636(c).* Subject to the provisions of Local Rule 21.00, a certified magistrate may conduct any or all proceedings in any civil case which is filed in this court, including the conduct of a jury or nonjury trial, and may order the entry of a final judgment, in accordance with 28 U.S.C. § 636(c). In the course of conducting such proceedings, a magistrate may hear and determine any and all pretrial and posttrial motions, including case-dispositive motions.

62.09: *Other Duties.* A magistrate is also authorized to:

(a) exercise general supervision of civil and criminal calendars, conduct calendar and status calls, and determine motions to expedite or postpone the trial of cases for the judges;

(b) conduct discovery conferences, pretrial conferences, settlement conferences, omnibus hearings, and related pretrial proceedings in civil and criminal cases;

(c) conduct arraignments in criminal cases not triable by the magistrate and take not guilty pleas in such cases;

(d) receive grand jury returns in accordance with Rule 6(f), F.R. Crim. P.;

(e) accept waivers of indictment, pursuant to Rule 7(b), F.R. Crim. P.;

(f) conduct voir dire and select petit juries for the court;

(g) accept petit jury verdicts in civil cases in the absence of a judge;

(h) conduct necessary proceedings leading to the potential revocation of probation;

(i) issue subpoenas, writs of habeas corpus ad testificandum or habeas corpus ad prosequendum, or other orders necessary to obtain the presence of parties, witnesses or evidence needed for court proceedings;

(j) order the exoneration or forfeiture of bonds;

(k) conduct proceedings for the collection of civil penalties of not more than $200 assessed under the Federal Boat Safety Act of 1971, in accordance with 46 U.S.C. § 1484(d);

(l) conduct examinations of judgment debtors in accordance with Rule 69, F.R. Crim. P.;

(m) conduct proceedings for initial commitment of narcotics addicts under Title III of the Narcotic Addict Rehabilitation Act;

(n) perform the functions specified in 18 U.S.C. § 4107, § 4108 and § 4109, regarding proceedings for verification of consent by offenders to transfer to or from the United States and the appointment of counsel therein; and

(o) perform any additional duty as is not inconsistent with the Constitution and laws of the United States.

Rule 63.00 Review and Appeal.

63.01: *Appeal of Non-Dispositive Matters — 28 U.S.C. § 636(b)(1)(A).* Any party may appeal from a magistrate's order determining a motion or matter under Local Rule 62.03 within 10 days after issuance of the magistrate's order, unless a different time is prescribed by the magistrate or a judge. Such party shall file with the clerk, and serve on the magistrate and all parties, a written statement of appeal which shall specifically designate the order, or part thereof, appealed from and the basis for any objection thereto. A judge shall consider the appeal and shall set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law. The judge may also reconsider *sua sponte* any matter determined by a magistrate under this rule.

63.02: *Review of Case-Dispositive Motions and Prisoner Litigation — 28 U.S.C. § 636(b)(1)(B).* Any party may object to a magistrate's proposed findings, recommendations or report under Local Rules 62.04, 62.05 or 62.06, within 10 days after being served with a copy thereof. Such party shall file with the clerk, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

63.03: *Special Master Reports — 28 U.S.C. § 636(b)(2).* Any party may seek review of, or action on, a special master report filed by a magistrate in accordance with the provisions of Rule 53(e), F.R. Civ. P.

63.04: *Appeal from Judgments in Misdemeanor Cases — 18 U.S.C. § 3402.* A defendant may appeal a judgment of conviction by a magistrate in a misdemeanor case by filing a notice of appeal and paying a $5.00 filing fee within 10 days after entry of the judgment, and by serving a copy of the notice upon the United States Attorney. The scope of appeal shall be the same as on an appeal from a judgment of the district court to the court of appeals.

63.05: *Appeal from Judgments in Civil Cases Disposed of on Consent of the Parties — 28 U.S.C. § 636(c).*

(a) *Appeal to the Court of Appeals.* Upon the entry of judgment in any civil case disposed of by a magistrate on consent of the parties under authority 28 U.S.C. § 636(c) and Local Rule 62.08, an aggrieved party shall appeal directly to the United States Court of Appeals for this circuit in the same manner as an appeal from any other judgment of this court.

(b) *Appeal to a District Judge.*

1. *Notice of Appeal.* In accordance with 28 U.S.C. § 636(c)(4), the parties may consent to appeal any judgment in civil case disposed of by a magistrate to a district judge, rather than directly to the Court of Appeals. In such case the appeal shall be taken by filing a notice of appeal with and paying a $5.00 filing fee to the clerk within 30 days after entry of the magistrate's judgment but if the United States or an officer or agency thereof is a party, the notice

of appeal may be filed by any party within 60 days of entry of the judgment. For good cause shown, the magistrate or a judge may extend the time for filing the notice of appeal for an additional 20 days. A request for such extension, however, shall be made before the original time period for such appeal has expired. In the event a motion for a new trial is timely filed, the time for appeal from the judgment of the magistrate shall be extended to 30 days from the date of the ruling on the motion for a new trial, unless a different period is provided by the Federal Rules of Civil or Appellate Procedure.

2. *Service of the Notice of Appeal.* The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record for all parties other than the appellant, or if a party is not represented by counsel to the party at his or her last known address.
3. *Record on Appeal.* The record on appeal to a judge shall consist of the original papers and exhibits filed with the court and the transcript of the proceedings before the magistrate, if any. Every effort shall be made by the parties, counsel, and the court to minimize the production and costs of transcriptions of the record, and otherwise to render the appeal expeditious and inexpensive, as mandated by 28 U.S.C. § 636(c)(4).
4. *Memoranda.* The appellant shall within 30 days of the filing of the notice of appeal file a typewritten memorandum together with two additional copies, stating the specific facts, points of law, and authorities on which the appeal is based. The appellees shall file an answering memorandum within 30 days of the filing of the appellant's memorandum. The court may extend these time limits upon a showing of good cause made by the party requesting the extension. Such good cause may include reasonable delay in the preparation of any necessary transcript. If an appellant fails to file his or her memorandum within the time provided by this rule, or any extension thereof, the court may dismiss the appeal.
5. *Disposition of the Appeal by a Judge.* The judge shall consider the appeal on the record, in the same manner as if the case had been appealed from a judgment of the district court to the court of appeals and may affirm, reverse, or modify the magistrate's judgment, or remand with instructions for further proceedings. The judge shall accept the magistrate's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the magistrate to judge the credibility of the witnesses.

63.06: *Appeals from Other Orders of a Magistrate.* Appeals from any other decisions and orders of a magistrate not provided for in this Local Rule 63.00 should be taken as provided by governing statute, rule, or decisional law.

Rules 64.00 to 79.00: Reserved for future purposes.

V. Admiralty and Maritime Claims

Rule 80.00 Title and Scope.

These rules apply to admiralty and maritime claims within the meaning and contemplation of Rule 9(h), F.R. Civ. P. and remedies within Supplemental Rule A of the Supplemental Rules for Certain Admiralty and Maritime Claims, F.R. Civ. P. unless inconsistent therewith.

Rule 81.00 Return of Process.

(a) All process shall be issued by the clerk without order, except suits prosecuted in forma pauperis sought to be filed without prepayment of fees or costs or without security.

(b) Unless otherwise ordered by the court, all process from this court within the scope of Supplemental Rules C and D, F.R. Civ. P. shall be returnable (1) by claim within 10 days after execution of the process and by motion or answer within 20 days following claim, or (2) both claim and motion or answer within 30 days following execution of the process.

(c) Unless otherwise ordered by the court, Rule 9(h), F.R. Civ. P. process from this court in personam shall be by civil summons returnable 20 days after service of the process except process within the contemplation of Supplemental Rule B, F.R. Civ. P. which shall be in a conformity therewith.

(d) Whenever a vessel is to be served, the party seeking service shall inform the Marshal of the registry of the vessel to be served, provided, however, failure to so inform the Marshal shall not be cause for the Marshal to refuse to serve the said vessel or in any way invalidate service of said vessel.

Rule 82.00 Publication.

(a) Publication required by Supplemental Rule C(4), F.R. Civ. P. shall be made once, without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(b) If the property arrested is not released within 10 days after execution of process, publication hereunder shall, unless otherwise ordered, be caused by the plaintiff or intervenor to be made within 17 days after execution of process.

(c) Such notice shall be substantially as follows, except and unless otherwise provided in actions for the enforcement of forfeitures for violation of any federal statute:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Caption of Case

NOTICE: The United States Marshal, Eastern District of North Carolina, has arrested the [(Vessel and appurtenances) (property)] in the above causes, civil and maritime for [nature of claim, i.e. contract, salvage, damage, collision, foreclosure of preferred mortgage, etc.] amounting to [$ (and nature of unliquidated items)]. Process returnable on [month, day and year, i.e. 30 days following execution of process as measured by Rule 6(a), F.R. Civ. P.] at the (name of courthouse), (city), (state), and any person claiming any interest therein must appear no later than that date and file written claims, answer or other defense, in person, or by attorney, or default and condemnation will be ordered.

DATED at [city of publication], (state), [month, day and year of publication].

[Name]
[Address]
[Attorney(s) for (Plaintiff) (Intervenor)]

(d) Plaintiff or intervenor will cause to be furnished to the Marshal, at the time process issues in Supplemental Rules B, C and D, F.R. Civ. P. actions, a prepared statement of attachment and garnishment or arrest with blanks for completion of date thereof and for signature below the name and title of such Marshal, together with self addressed envelope to plaintiff or plaintiff's attorney with sufficient postage affixed. The Marshal will promptly cause same to be completed and mailed after execution of process.

(e) Plaintiff shall effect publication required by Supplemental Rule F(4), F.R. Civ. P. without further court order, in any one of the following newspapers:

Elizabeth City Division:
Virginian Pilot, Norfolk, Virginia
The News and Observer, Raleigh, North Carolina

Wilmington Division:
Wilmington Morning Star, Wilmington, North Carolina
The News and Observer, Raleigh, North Carolina

All Other Divisions:
The News and Observer, Raleigh, North Carolina

(f) Whenever publication is required by Supplemental Rules C(4) and F(4), F.R. Civ. P. plaintiff or intervenor shall cause to be filed with the clerk, not later than the return date, sworn proof of publication by or on behalf of the publisher or the editor in charge of legal notices of the newspaper in which published, together with a copy of the proof of publication, or publication or reproduction thereof.

Rule 83.00 Publication of Notice of Sale.

Notice of sale of property in suits in rem and quasi in rem, except in suits on behalf of the United States where other notice is prescribed by statute, shall be caused by the Marshal to be published in any one of the newspapers set forth in Local Rule 82.00(a) and published at least twice, the first publication to be at least 1 calendar week prior to date of sale and the second publication to be at least 3 calendar days prior to date of sale, unless otherwise ordered by the court.

Rule 84.00 Stipulations for Costs and Security.

(a) In actions where there is sought, in whole or in part, a remedy listed in Supplemental Rule A of the Supplemental Rules For Certain Admiralty and Maritime Claims, F.R. Civ. P., no initial pleading seeking such remedy, or claim pursuant to supplemental Rule F(5), F.R. Civ. P. shall be filed unless the party offering the same shall first file a stipulation for costs in the sum of $250.00, or in case 2 or more vessels are jointly or severally proceeded against, a sum equal to $250.00 per vessel, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. In all other admiralty and maritime actions, no initial complaint, whether original or interlocutory, shall be filed by any party, unless the party offering the same shall first file a stipulation for costs in the sum of $100.00, conditioned that the principal shall pay all costs and expenses awarded against the principal by any interlocutory order or final judgment, or on appeal. All stipulations shall be with at least 1 surety resident in this

district. Any incorporated surety company duly authorized to do business in this district may be accepted as such surety. In the place of the stipulation for costs with surety, a party may deposit the necessary amount in the registry of the court accompanied by a statement conditioned as above, referring to such deposited amount.

(b) Seamen suing as provided in 28 U.S.C. § 1916 shall not be required to file a stipulation for costs in the first instance. The court may however, order a stipulation to be given at any time.

(c) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater, better or lesser security; and any such order may be enforced by attachment or otherwise.

(d) At any time, any party having an interest in the subject matter of the action may move the court, on due notice and for cause, for greater or better costs security; and any such order may be enforced by attachment or otherwise. The court may enter such order on its own motion, with or without notice.

(e) In all actions in rem brought by seamen in their own names and for their own benefit for wages, salvage, or the enforcement of laws for their health or safety without prepaying costs or fees or furnishing security therefor, pursuant to 28 U.S.C. § 1916, the Marshal may at any time after service of process, attachment, or seizure of a vessel, petition any judge or magistrate of this court to require the posting of security for any or all reasonable expenses which have been or may be incurred while the vessel is in the custody of the Marshal. Upon filing such petition for the posting of security, a hearing date shall promptly be set by the court and the Marshal shall give notice of the time and place of such hearing by serving a copy of the notice of hearing together with a copy of the petition upon counsel of record for the parties or upon the parties, and by posting a copy of same on the vessel.

Rule 85.00 Form of Stipulations.

Except in cases instituted by the United States by information, or complaint of information upon seizures for any breach of the revenue, navigation, or other laws of the United States, stipulations or bonds in admiralty and maritime actions need not be under seal and may be executed by the agent or counsel of the stipulator or obligor. Stipulations for costs with corporate surety need not be signed or executed by the party, but may be signed by its agent or counsel, and shall be sufficient in any event if executed only by the surety approved by the court.

Rule 86.00 Pleadings and Parties.

(a) Every complaint filed as a Rule 9(h), F.R. Civ. P. action shall set forth "In Admiralty" following the designation of the court, in addition to the statement, if any, contained in the body of the complaint pursuant to such rule.

(b) In actions under Supplemental Rules B, C or D, F.R. Civ. P. the business telephone number and address of the plaintiff's counsel or the plaintiff, if plaintiff appears *pro se,* shall be included.

(c) Every complaint in Supplemental Rules B and C, F.R. Civ. P. actions shall state the amount of the debt, damages, or salvage for which the action is brought, and shall include in addition thereto the amount of any claim for unliquidated items claims, including attorneys fees.

(d) In cases of salvage, the complaint shall also state to the extent known or estimate the value of the hull, cargo, freight and other property salved, the amount claimed, the names of the principal salvors, and that the suit is instituted in their behalf and in behalf of all other persons interested or associated with them. There shall also be attached to the complaint a list of all known

salvors and all persons believed entitled to share in the salvage, and also any agreement of consortship available and known to exist among them or any of them, including a copy of any such agreement.

Rule 87.00 Verification of Pleadings and Answers to Interrogatories.

Every complaint and claim in Supplemental Rules B, C and D, F.R. Civ. P. actions shall be verified on oath or solemn affirmation by a party, or an officer of a corporate party. If no party or corporate officer is within the district, verification of a complaint, claim or answers to interrogatories may be made by an agent, attorney-in-fact or attorney of record, who shall state briefly the sources of his or her knowledge, information and belief, declare that the document affirmed is true to the best of his or her knowledge, information and belief, state the reason why verification is not made by the party or a corporate officer, and that he or she is authorized so to act. Any such verification will be deemed to have been made by the party to whom a document might apply as if verified personally. Any interested party may move the court, with or without a request for stay, for the personal oath of a party or all parties, or that of a corporate officer. If required by the court, such verification shall be procured by commission or as otherwise ordered.

Rule 88.00 Intervention.

(a) Whenever a vessel or other property is seized, attached or arrested in a proceeding and said property is in the hands of the Marshal, anyone having a claim against the vessel or property is required to present the same by intervening complaint filed in the case and not by way of original complaint, unless otherwise ordered by the court. Upon the filing of each such intervening complaint, the clerk [or, counsel who files same] shall forthwith deliver a conformed copy thereof to the Marshal who shall thereupon post such copy on the vessel or property, but the Marshal need not rearrest or reattach the vessel or property. Counsel for intervening parties are required to ascertain the names and addresses of other counsel of record in the proceedings at the time of the filing of an intervening complaint and forthwith to serve a copy of the intervening complaint, including any exhibits attached to the original thereof, upon such other counsel and shall thereafter file a certificate with the clerk setting forth the names and addresses of counsel served, method of service and the date thereof.

(b) Subject to other rules of this court, any party is permitted to intervene without the filing of a motion or petition to intervene in any proceeding filed pursuant to Rule 9(h), F.R. Civ. P. where a vessel or other property has been arrested or attached and is in the hands of the Marshal, except that no party is permitted to intervene in any such proceeding without first obtaining leave of court if intervention is sought within 15 days prior to the date for which a sale of the vessel or property has been set by the court. If intervention is sought within said 15 day period by any party, that party is required to file a motion or petition to intervene and to serve copies thereof along with any exhibits or documents relied upon in support of such intervenors' claims and request for intervention, upon all counsel of record. In such circumstances the court may allow intervention upon such terms and conditions which it considers equitable to the interests of all parties involved.

(c) Following an initial attachment, arrest or seizure, any party intervening in a proceeding alleging a claim against the property is required to deposit funds for the safekeeping of the property with the Marshal upon the filing of such intervening claim or complaint. Unless the court otherwise orders for good cause shown, the deposit is to be in an amount determined by the Marshal.

Rule 89.00 Appraisement and Appraisers and Other Matters.

(a) Order for appraisement of property under arrest or attachment, or of plaintiff's interest in the vessel and pending freight under Supplemental Rule F(7), F.R. Civ. P. shall issue only upon motion and notice pursuant to Rule 7(b), F.R. Civ. P. or upon consent of the attorneys for the respective parties. Before executing their trust, appraisers shall be sworn or affirmed to faithful discharge thereof before the clerk or a deputy clerk. The appraisement shall be returned to the clerk and the clerk shall give notice of the return to the parties or their attorneys. Any party, on notice, may appeal the appraisement instanter to the court. After return of the appraisement, the court, on notice and hearing, shall determine the value of the property under arrest or attachment or the value of plaintiff's interest in the vessel and pending freight. For their services, appraisers shall be paid fees, as ordered by the court, by the party at whose instance the appraisal was ordered. Appraiser's fees shall thereafter be taxed as the court orders.

(b) All other maritime procedures and remedies such as motions for appointment of substitute custodians and like matters are left to be handled by an originating motion pursuant to Rule 7(b), F.R. Civ. P., on such notice as the exigencies of the circumstances may require.

Rule 90.00 Release of Seizures — Custodial Cost — General Bonds.

(a) Property seized by the Marshal may be released as follows:

(1) By the Marshal upon the receipt of security by the Marshal, accompanied by the endorsed express authorization for release signed by the party or counsel for the party as provided by Supplemental Rule E(5)(c), F.R. Civ. P. if all costs and charges of the court and its officers shall have first been paid. Moneys received as part of any cash stipulation shall be delivered by the Marshal to the clerk for deposit in the registry of the court.

(2) In action entirely for a sum certain, by paying into the court the amount alleged in the complaint to be due, with interest at 6 percent per annum thereon from the date claimed to be due to a date 24 months after the date the claim was filed, or by filing an approved stipulation for such alleged amount and interest. In either event, claim of the property shall be filed.

(3) In actions other than possessory, petitory, and partition, by filing, in addition to a claim of the property, an approved stipulation for the amount of the appraised or agreed value of the property seized, with interest (unless otherwise ordered by the court), interlocutory or final, and to pay the amount awarded by the final decree rendered by this court or by any appellate court, with interest.

(4) In possessory, petitory, and partition actions, only upon the order of the court, and on such security and terms as ordered.

(5) Upon the dismissal or discontinuance of the action or upon the written consent of the attorney for the party on whose behalf the property is detained, if all costs and charges of the court and its officers shall have first been paid.

(b) The Marshal shall not deliver any property so released until costs and charges of the Marshal shall first have been paid.

(c) In any general bond as provided for by Supplemental Rule E(5)(b) F.R. Civ. P. the vessel will be identified by name, nationality, dimensions, official number or registration number, hailing port and port of documentation, to the extent applicable. The owner of such vessel shall also file complete designated United States address for communications to the owner or designated agent, which shall be by mail. Execution of process against the vessel so stayed under

Supplemental Rule E(5)(b), F.R. Civ. P. shall be endorsed to the Marshal as stayed pursuant to the rule. Such process shall be served by the Marshal together with a copy of the complaint on the master or other person in whose charge or custody the vessel is found and the Marshal shall make his or her return thereof. If no master or other person in charge of custody is found aboard the vessel, the Marshal shall so make his or her return accordingly, and the clerk shall advise by mail the owner or designated agent, at the address furnished pursuant to this rule, of the nature of the action, any amount claimed, the plaintiff, the name and address of plaintiff's attorney, the case number, and the return day 30 days from the date of the Marshal's attempt. The clerk will maintain a current list of vessels subject to a general bond and file said bonds alphabetically by name of vessel and endorsed as provided by Supplemental Rule E(5)(b), F.R. Civ. P.

Rule 91.00 Taxation as Costs.

If costs shall be awarded to either or any party, then the reasonable premium or expense paid on all bonds or stipulations or other security by the party in whose favor such costs are allowed shall be taxed as a part of the costs of the case. In addition thereto, if costs shall be awarded to either or any party, then the reasonable expenses paid by a party incidental to or arising out of the attachment or arrest of any property in the proceedings or while said property is "in custodia legis" shall be taxed as a part of the costs of the case.

Rule 92.00 Stay of Execution or of Release of Property After Judgment or Dismissal.

No execution of judgment shall issue nor shall seized property be released pursuant to judgment or order of dismissal, until 10 days after its entry. Upon the filing of a motion for new trial or notice of appeal or motion to set aside default within said 10 day period, a further stay shall exist for a period not to exceed 30 days from the entry of judgment or dismissal to permit the entry of an order fixing the amount of a supersedeas bond and the filing of same.

Rule 93.00 Possessory Actions — Short Day Return.

In all possessory actions upon special order of the court, process may be made returnable upon a short day. The answer shall be filed within such time as may be specifically ordered by the court, and a day of hearing then fixed, unless otherwise ordered. The hearing of possessory suits shall be given preference.

Rule 94.00 Claims After Sale, How Limited.

Claims upon the proceeds of sale of property under a final decree, except for seamen's wages, shall not be admitted in behalf of lienors who file their claims after the sale, to the prejudice of lienors who filed their claims before the sale, but shall be limited to remnants and surplus, unless for cause shown it shall be otherwise ordered.

Rules 95.00 to 99.00: Reserved for future purposes.

Appendix A

Plan for Achieving Prompt Disposition of Criminal Cases for the Eastern District of North Carolina — Statement of Time Limits and Procedures

Preamble

As required by the Speedy Trial Act of 1974 and the Speedy Trial Act Amendments Act of 1979, the judges of the United States District Court for the Eastern District of North Carolina adopt the following time limits and procedures to minimize undue delay and to further the prompt disposition of criminal cases and certain juvenile proceedings.

II. Time Limits Adopted by the Court

1. Applicability.

(a) *Offenses.* The time limits set forth herein are applicable to all criminal offenses triable in this court,* including cases triable by United States magistrates, except for petty offenses as defined in 18 U.S.C. § 1(3). Except as specifically provided, they are not applicable to proceedings under the Federal Juvenile Delinquency Act. [§ 3172]

(b) *Persons.* The time limits are applicable to persons accused who have not been indicted or informed against as well as those who have, and the word "defendant" includes such persons unless the context indicates otherwise.

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*18 U.S.C. § 3172 defines offense as "any Federal criminal offense which is in violation of any Act of Congress . . . ." The district courts with jurisdiction over offenses created by other legislatures will wish to consider the extent to which Speedy Trial Act standards should be applied to trials for such offenses.

2. Priorities in Scheduling Criminal Cases.

Preference shall be given to criminal proceedings as far as practicable as required by Rule 50(a) of the Federal Rules of Criminal Procedure. The trial of defendants in custody solely because they are awaiting trial and of high-risk defendants as defined in section 5 should be given preference over other criminal cases. [§ 3164(a)]

3. Time within Which an Indictment or Information Must Be Filed.

(a) *Time Limits.* If an individual is arrested or served with a summons and the complaint charges an offense to be prosecuted in this district, any indictment or information subsequently filed in connection with such charge shall be filed within 30 days of arrest or service. [§ 3161(b)]

* (b) *Grand Jury Not in Session.* If the defendant is charged with a felony to be prosecuted in this district, and no grand jury in the district has been in session during the 30-day period prescribed in subsection (a), such period shall be extended an additional 30 days. [§ 3161(b)]

(c) *Measurement of Time Periods.* If a person has not been arrested or served with a summons on a Federal charge, an arrest will be deemed to have been made at such time as the person (i) is held in custody solely for the purpose of responding to a Federal charge; (ii) is delivered to the custody of a Federal official in connection with a Federal charge; or (iii) appears before a judicial officer in connection with a Federal charge.

(d) *Related Procedures.*

(1) At the time of the earliest appearance before a judicial officer of a person who has been arrested for an offense not charged in an indictment or information, the judicial officer shall establish for the record the date on which the arrest took place.

(2) In the absence of a showing to the contrary, a summons shall be considered to have been served on the date of service shown on the return thereof.

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* This subsection should be excluded in districts in which there is no likelihood of its coming into play.

4. Time within Which Trial Must Commence.

(a) *Time Limits.* The trial of a defendant shall commence not later than 70 days after the last to occur of the following dates:

(1) The date on which an indictment or information is filed in this district;

(2) The date on which a sealed indictment or information is unsealed; or

(3) The date of the defendant's first appearance before a judicial officer of this district.

[§ 3161(c)(1)]

(b) *Retrial; Trial after Reinstatement of an Indictment or Information.* The retrial of a defendant shall commence within 70 days from the date the order occasioning the retrial becomes final, as shall the trial of a defendant, upon an indictment or information dismissed by a trial court and reinstated following an appeal. If the retrial or trial follows an appeal or collateral attack, the court may extend the period if unavailability of witnesses or other factors resulting from passage of time make trial within 70 days impractical. The extended period shall not exceed 180 days. [§§ 3164(d)(2), (e)]

(c) *Withdrawal of Plea.* If a defendant enters a plea of guilty or nolo contendere to any or all charges in an indictment or information and is subsequently permitted to withdraw it, the time limit shall be determined for all counts as if the indictment or information were filed on the day the order permitting withdrawal of the plea became final. [§ 3161(i)]

(d) *Superseding Charges.* If, after an indictment or information has been filed, a complaint, indictment, or information is filed which charges the defendant with the same offense or with an offense required to be joined with that offense, the time limit applicable to the subsequent charge will be determined as follows:

(1) If the original indictment or information was dismissed on motion of the defendant before the filing of the subsequent charge, the time limit shall be determined without regard to the existence of the original charge. [§ 3161(d)(1)]

(2) If the original indictment or information is pending at the time the subsequent charge is filed, the trial shall commence with the time limit for commencement of trial on the original indictment or information. [§ 3161(h)(6)]

(3) If the original indictment or information was dismissed on motion of the United States attorney before the filing of the subsequent charge, the trial shall commence within the time limit for commencement of trial on the original indictment or information, but the period during which the defendant was not under charges shall be excluded from the computations. Such period is the period between the dismissal of the original indictment or information and the date the time would have commenced to run on the subsequent charge had there been no previous charge.* [§ 3161(h)(6)]

If the subsequent charge is contained in a complaint, the formal time limit within which an indictment or information must be obtained on the charge shall be determined without regard to the existence of the original indictment or information, but earlier action may in fact be required if the time limit for commencement of trial is to be satisfied.

(e) *Measurement of Time Periods.* For the purposes of this section:

(1) If a defendant signs a written consent to be tried before a magistrate and no indictment or information charging the offense has been filed, the time limit shall run from the date of such consent.

(2) In the event of a transfer to this district under Rule 20 of the Federal Rules of Criminal Procedure, the indictment or information shall be deemed filed in this district when the papers in the proceeding or certified copies thereof are received by the clerk.

(3) A trial in a jury case shall be deemed to commence at the beginning of voir dire.

(4) A trial in a non-jury case shall be deemed to commence on the day the case is called, provided that some step in the trial procedure immediately follows.

(f) *Related Procedures.*

(1) At the time of the defendant's earliest appearance before a judicial officer of this district, the officer will take appropriate steps to assure that the defendant is represented by counsel and shall appoint counsel where appropriate under the Criminal Justice Act and Rule 44 of the Federal Rules of Criminal Procedure.

(2) The court shall have sole responsibility for setting cases for trial after consultation with counsel. At the time of arraignment or as soon thereafter as is practicable, each case will be set for trial on a day certain or listed for trial on a weekly or other short-term calendar. [§ 3161(a)]

(3) Individual calendars shall be managed so that it will reasonably anticipate that every criminal case set for trial will be reached during the week of original setting. A conflict in schedules of Assistant United States Attorneys or defense counsel will be ground for a continuance or delayed setting only if approved by the court and called to the court's attention at the earliest practicable time.

(4) In the event that a complaint, indictment, or information is filed against a defendant charged in a pending indictment or information or in an indictment or information dismissed on motion of the United States Attorney, the trial on the new charge shall commence within the time limit for commencement of trial on the original indictment or information unless the court finds that the new charge is not for the same offense charged in the original indictment or information or an offense required to be joined therewith.

(5) At the time of the filing of a complaint, indictment, or information described in paragraph (4), the United States Attorney shall give written notice to the court of that circumstance and of his position with respect to the computation of the time limits.

(6) All pretrial hearings shall be conducted as soon after the arraignment as possible, consistent with the priorities of other matters on the court's criminal docket.

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* Under the rule of this paragraph, if an indictment was dismissed on motion of the prosecutor on May 1, with 20 days remaining within which trial must be commenced, and the defendant was arrested on a new complaint on June 1, the time remaining for trial would be 20 days from June 1: the time limit would be based on the original indictment, but the period from the dismissal to the new arrest would not count. Although the 30-day arrest-to-indictment time limit would apply to the new arrest as a formal matter, the short deadline for trial would necessitate earlier grand jury action.

5. Defendants in Custody and High-Risk Defendants.*

(a) *Time Limits.* Notwithstanding any longer time periods that may be permitted under sections 3 and 4, the following time limits will also be applicable to defendants in custody and high-risk defendants as herein defined:

(1) The trial of a defendant held in custody solely for the purpose of trial on a Federal charge shall commence within 90 days following the beginning of continuous custody.

(2) The trial of a high-risk defendant shall commence within 90 days of the designation as high-risk.

[§ 3164(b)]

(b) *Definition of "High-Risk Defendant."* A high-risk defendant is one reasonably designated by the United States Attorney as posing a danger to himself or any other person or to the community.

(c) *Measurement of Time Periods.* For the purposes of this section:

(1) A defendant is deemed to be in detention awaiting trial when he is arrested on a Federal charge or otherwise held for the purpose of responding to a Federal charge. Detention is deemed to be solely because the defendant is awaiting trial unless the person exercising custodial authority has an independent basis (not including a detainer) for continuing to hold defendant.

(2) If the case is transferred pursuant to Rule 20 of the Federal Rules of Criminal Procedure and the defendant subsequently rejects disposition under Rule 20 or the court declines to accept the plea, a new period of continuous detention awaiting trial will begin at that time.

(3) A trial shall be deemed to commence as provided in sections 4(e)(3) and 4(e)(4).

(d) *Related Procedures.*

(1) If a defendant is being held in custody solely for the purpose of awaiting trial, the United States Attorney shall advise the court at the earliest practicable time of the date of the beginning of such custody.

(2) The United States Attorney shall advise the court at the earliest practicable time (usually at the hearing with respect to bail) if the defendant is considered by him to be high risk.

(3) If the court finds that the filing of a "high-risk" designation as a public record may result in prejudice to the defendant, it may order the designation sealed for such period as is necessary to protect the defendant's right to a fair trial, but not beyond the time that the court's judgment in the case becomes final. During the time the designation is under seal, it shall not be made known to other persons without the permission of the court.

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* If a defendant's presence has been obtained through the filing of a detainer with state authorities, the Interstate Agreement on Detainers, 18 U.S.C., Appendix, may require that trial commence before the deadline established by the Speedy Trial Act. See U.S. v. Mauro, 436 U.S. 340, 356-57 n.24 (1978).

6. Exclusion of Time from Computations.

(a) *Applicability.* In computing any time limit under section 3, 4, or 5, the periods of delay set forth in 18 U.S.C. § 3161(h) shall be excluded. Such periods of delay shall not be excluded in computing the minimum period for commencement of trial under section 7.

(b) *Records of Excludable Time.* The clerk of the court shall enter on the docket, in the form prescribed by the Administrative Office of the United States Courts, information with respect to excludable periods of time for each criminal defendant. With respect to proceedings prior to the filing of an indictment or

information, excludable time shall be reported to the clerk by the United States Attorney.

(c) *Stipulations.*

(1) The attorney for the government and the attorney for the defendant may at any time enter into stipulations with respect to the accuracy of the docket entries recording excludable time.

(2) To the extent that the amount of time stipulated by the parties does not exceed the amount recorded on the docket for any excludable period of delay, the stipulation shall be conclusive as between the parties unless it has no basis in fact or law. It shall similarly be conclusive as to a codefendant for the limited purpose of determining, under 18 U.S.C. § 3161(h)(7), whether time has run against the defendant entering into the stipulation.

(3) To the extent that the amount of time stipulated exceeds the amount recorded on the docket, the stipulation shall not have effect unless approved by the court.

(d) *Pre-Indictment Procedures.*

(1) In the event that the United States Attorney anticipates that an indictment or information will not be filed within the time limit set forth in section 3, he may file a written motion with the court for a determination of excludable time. In the event that the United States Attorney seeks a continuance under 18 U.S.C. § 3161(h)(8), he shall file a written motion with the court requesting such a continuance.

(2) The motion of the United States Attorney shall state (i) the period of time proposed for exclusion, and (ii) the basis of the proposed exclusion. If the motion is for a continuance under 18 U.S.C. § 3161(h)(8), it shall also state whether or not the defendant is being held in custody on the basis of the complaint. In appropriate circumstances, the motion may include a request that some or all of the supporting material be considered *ex parte* and *in camera.*

(3) The court may grant a continuance under 18 U.S.C. § 3161(h)(8) for either a specific period of time or a period to be determined by reference to an event (such as recovery from illness) not within the control of the government. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

(e) *Post-Indictment Procedures.*

(1) At each appearance of counsel before the court, counsel shall examine the clerk's records of excludable time for completeness and accuracy and shall bring to the court's immediate attention any claim that the clerk's record is in any way incorrect.

(2) In the event that the court continues a trial beyond the time limit set forth in section 4 or 5, the court shall determine whether the limit may be recomputed by excluding time pursuant to 18 U.S.C. § 3161(h).

(3) If it is determined that a continuance is justified, the court shall set forth its findings in the record, either orally or in writing. If the continuance is granted under 18 U.S.C. § 3161(h)(8), the court shall also set forth its reasons for finding that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial. If the continuance is to a date not certain, the court shall require one or both parties to inform the court promptly when and if the circumstances that justify the continuance no longer exist. In addition, the court shall require one or both parties

to file periodic reports bearing on the continued existence of such circumstances. The court shall determine the frequency of such reports in the light of the facts of the particular case.

7. Minimum Period for Defense Preparation.

Unless the defendant consents in writing to the contrary, the trial shall not commence earlier than 30 days from the date on which the indictment or information is filed or, if later, from the date on which counsel first enters an appearance or on which the defendant expressly waives counsel and elects to proceed *pro se.* In circumstances in which the 70-day time limit for commencing trial on a charge in an indictment or information is determined by reference to an earlier indictment or information pursuant to section 4(d), the 30-day minimum period shall also be determined by reference to the earlier indictment or information. When prosecution is resumed on an original indictment or information following a mistrial, appeal, or withdrawal of a guilty plea, a new 30-day minimum period will not begin to run. The court will in all cases schedule trials so as to permit defense counsel adequate preparation time in the light of all circumstances. [§ 3161(c)(2)]

8. Time within Which Defendant Should Be Sentenced.

*(a) *Time Limit.* A defendant shall ordinarily be sentenced within 45 days of the date of his conviction or plea of guilty or nolo contendere.

(b) *Related Procedures.* If the defendant and his counsel consent thereto, a presentence investigation may be commenced prior to a plea of guilty or nolo contendere or a conviction.

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* The Speedy Trial Act does not establish time limits governing the period between conviction and sentencing, but the district courts may wish to do so. The time limit set forth in brackets in this section is a suggested limit, and not a maximum permissible limit.

9. Juvenile Proceedings.

(a) *Time within Which Trial Must Commence.* An alleged delinquent who is in detention pending trial shall be brought to trial within 30 days of the date on which such detention was begun, as provided in 18 U.S.C. § 5036.

(b) *Time of Dispositional Hearing.* If a juvenile is adjudicated delinquent, a separate dispositional hearing shall be held no later than 20 court days after trial, unless the court has ordered further study of the juvenile in accordance with 18 U.S.C. § 5037(c).

10. Sanctions.

(a) *Dismissal or Release from Custody.* Failure to comply with the requirements of Title I of the Speedy Trial Act may entitle the defendant to dismissal of the charges against him or to release from pretrial custody. Nothing in this plan shall be construed to require that a case be dismissed or a defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §§ 3162 and 3164.*

(b) *High-Risk Defendants.* A high-risk defendant whose trial has not commenced within the time set forth in 18 U.S.C. § 3164(b) shall, if the failure to commence trial was through no fault of the attorney for the government, have his release conditions automatically reviewed. A high-risk defendant who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under Chapter 207 of Title 18, U.S.C., to ensure that he shall appear at trial as required. [§ 3164(c)]

(c) *Discipline of Attorneys.* In a case in which counsel (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial, (2) files a motion solely for the purpose of delay which he knows is frivolous and without merit, (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of the continuance, or (4) otherwise willfully fails to proceed to trial without justification consistent with 18 U.S.C. § 3161, the court may punish such counsel as provided in 18 U.S.C. §§ 3162(b) and (c).

(d) *Alleged Juvenile Delinquents.* An alleged delinquent in custody whose trial has not commenced within the time limit set forth in 18 U.S.C. § 5306 shall be entitled to dismissal of his case pursuant to that section unless the Attorney General shows that the delay was consented to or caused by the juvenile or his counsel, or would be in the interest of justice in the particular case.

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* Dismissal may also be required in some cases under the Interstate Agreement on Detainers, 18 U.S.C., Appendix.

11. Persons Serving Terms of Imprisonment.

If the United States Attorney knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly seek to obtain the presence of the prisoner for trial, or cause a detainer to be filed, in accordance with the provisions of 18 U.S.C. § 3161(j).

12. Effective Dates.

(a) The amendments to the Speedy Trial Act made by Public Law 96-43 became effective August 2, 1979. To the extent that this revision of the district's plan does more than merely reflect the amendments, the revised plan shall take effect upon approval of the reviewing panel designated in accordance with 18 U.S.C. § 3165(c). However, the dismissal sanction and the sanctions against attorneys authorized by 18 U.S.C. § 3162 and reflected in sections 10(a) and (c) of this plan shall apply only to defendants whose cases are commenced by arrest or summons on or after July 1, 1980,* and to indictments and informations filed on or after that date.

(b) If a defendant was arrested or served with a summons before July 1, 1979, the time within which an information or indictment must be filed shall be determined under the plan that was in effect at the time of such arrest or service.

(c) If a defendant was arraigned before August 2, 1979, the time within which the trial must commence shall be determined under the plan that was in effect at the time of such arraignment.

(d) If a defendant was in custody on August 2, 1979, solely because he was awaiting trial, the 90-day period under section 5 shall be computed from that date.

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* This date should be advanced if sanctions are to be implemented earlier pursuant to 18 U.S.C. § 3174(c).

(2A) United States Bankruptcy Court for the Eastern District of North Carolina.

Editor's Note. — At the time of publication of the 1983 Cumulative Supplement, local bankruptcy rules had not been revised so as to reflect the Bankruptcy Rules which were adopted by the U. S. Supreme Court on April 25, 1983, effective Aug. 1, 1983. The Bankruptcy Rules adopted by the U. S. Supreme Court are set forth in Volume 103, No. 14, of the Supreme Court Reporter.

(3) United States District Court for the Western District of North Carolina

Rules of Court

As Amended to July 15, 1983

I. General Rules

Rule
2. Sessions.
11. Fair Trial and Free Press in Criminal Cases.
12. Forfeiture of Collateral Security in Lieu of Appearance.
13. Sessions of Grand Jury.
14. Additional Duties of Magistrates.
15. Rule for Custody and Disposition of Models, Exhibits, and Depositions.

II. Bankruptcy Rules

Automatic Reference of Chapter X Bankruptcy Cases.

I. General Rules

Rule 2. Sessions.

The court shall be in continuous session in all divisions of the district, and all matters, criminal and civil, shall be subject to being called for hearing and trial at any time upon reasonable notice to the parties.

Regular terms for the disposition of criminal cases shall be as follows:

ASHEVILLE DIVISION:

First Monday, January, March, May, July, September, November

BRYSON CITY DIVISION:

Third Monday, January, March, May, July, September, November

CHARLOTTE DIVISION:

First Monday, February, Arpil, June, August, October, December

SHELBY DIVISION:

(Rutherfordton)

First Monday, February, April, June, August, October, December

STATESVILLE DIVISION:

Third Monday, February, April, June, August, October, December

(When the first day of any scheduled term falls on a legal holiday, court will convene the following day.)

Additional criminal sessions will be scheduled from time to time in all divisions as may be required to dispose of the criminal dockets promptly.

Trial calendars in civil cases will be prepared by the court, usually at the time of the Motion, Pre-trial and Settlement conference, or soon thereafter. Civil sessions of court will be held as often as necessary to accomplish, insofar as possible and except in the unusual cases, the following *illustrative* schedule of disposition of cases.

(a) In the unusual case where *both* sides press for trial and *both* counsel are diligent in preparation — not more, and usually less, than six months should elapse between filing of complaint and trial.

(b) When *one* side presses for an early trial, the time lapse from filing complaint to trial should not exceed nine months.

(c) Where neither side presses for an early trial, the time lapse from filing complaint to trial should not exceed fifteen months.

(d) If any case becomes two years old — regardless of its difficulty — it will be treated as a judicial emergency, unless, for good cause, an order is entered putting the case on the inactive docket.

If necessary to promote the efficient administration of justice, all hearings and trials of civil cases may be transferred from any division to any other division within the district. With the consent of the parties, the judges may conduct hearings and trials at any place within the district.

Effect of Amendments. — The amendment adopted Aug. 12, 1971, rewrote the second paragraph. As to the Charlotte and Statesville Divisions, the amendment was made effective Jan. 1, 1972.

The amendment adopted Mar. 12, 1973, again rewrote the second paragraph. In addition to changing the dates of the terms and providing for additional terms, the amendment added the sentence in parentheses at the end of the paragraph.

An order adopted Mar. 14, 1973, provides for additional sessions of grand juries to pass upon indictments for the new criminal terms.

The amendment adopted October 31, 1975 rewrote the second paragraph.

The amendment adopted Jan. 1, 1982, rewrote the second paragraph, changing the dates of the terms and providing for additional terms in all five divisions.

Rule 11. Fair Trial and Free Press in Criminal Cases.

A. It is the duty of the lawyer not to release or authorize the release of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.

With respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in the investigation shall refrain from making any extrajudicial statement, for dissemination by any means of public communication, that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers, or otherwise to aid in the investigation.

From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement, for dissemination by any means of public communication, relating to that matter and concerning:

(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

(2) The existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

(3) The performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

(5) The possibility of a plea of guilty to the offense charged or a lesser offense;

(6) Any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case.

The foregoing shall not be construed to preclude the lawyer during this period, in the proper discharge of his official or professional obligations, from announcing the fact and circumstances of arrest (including time and place of arrest, resistance, pursuit, and use of weapons), the identity of the investigating and arresting officer or agency, and the length of the investigation; from making an announcement, at the time of seizure of any physical evidence other than a confession, admission or statement, which is limited to a description of the evidence seized; from disclosing the nature, substance, or text of the charge, including a brief description of the offense charged; from quoting or referring without comment to public records of the court in the case; from announcing the scheduling or result of any stage in the judicial process; from requesting assistance in obtaining evidence; or from announcing without further comment that the accused denies the charges made against him.

During the trial of any criminal matter, including the period of selection of the jury, no lawyer associated with the prosecution or defense shall give or authorize any extrajudicial statement or interview, relating to the trial or the parties or issues in the trial, for dissemination by any means of public communication, except that the lawyer may quote from or refer without comment to public records of the court in the case.

After the completion of a trial or disposition without trial of any criminal matter, and prior to the imposition of sentence, a lawyer associated with the prosecution or defense shall refrain from making or authorizing any extrajudicial statement for dissemination by any means of public communication if there is a reasonable likelihood that such dissemination will affect the imposition of sentence.

Nothing in this rule is intended to preclude the formulation or application of more restrictive rules relating to the release of information about juvenile or other offenders, to preclude the holding of hearings or the lawful issuance of reports by legislative, administrative, or investigative bodies, or to preclude any lawyer from replying to charges of misconduct that are publicly made against him.

B. All courthouse personnel, including among others, marshals, deputy marshals, court clerks, bailiffs, and court reporters shall not disclose to any person, without authorization by the court, information concerning arguments and hearings in criminal cases held in chambers or otherwise outside the presence of the public, or disclose any other information relating to a pending criminal case that is not a part of the public records of this court.

C. In a widely publicized or sensational case, the court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order.

Editor's Note. — This rule was adopted by order dated April 29, 1969.

Rule 12. Forfeiture of Collateral Security in Lieu of Appearance.

Pursuant to Rule 9, Rules of Procedure, United States magistrates, in the interest of justice, good court administration, and sound law enforcement, for the petty offenses listed below, whether originating under the applicable

federal statutes or regulations or applicable state statute by virtue of the Assimilated Crimes Act, 18 U.S.C. § 13, occurring within the territorial jurisdiction of the United States magistrate, collateral may be posted in lieu of the appearance of the offender unless (1) the offense is denominated as one for which appearance is mandatory, or (2) it is the opinion of the arresting or citing officer that the offense charged was aggravated.

Upon the failure of the person charged with an offense or offenses to appear before the United States magistrate for trial of the offense or offenses listed below, except those offenses denominated "mandatory appearance", and not aggravated, as provided above, the collateral in the amount listed opposite the offense shall be forfeited to the United States. The posting of said collateral shall signify that the offender does not contest the charge nor request a hearing before the United States magistrate, and said collateral shall be administratively forfeited.

The clerk shall certify the record of any applicable traffic violation to the proper state authority.

No forfeiture of collateral will be permitted for a subsequent offense or offenses not arising out of the same facts or sequence of events resulting in the original offense or offenses.

There shall be maintained in the office of the clerk, and with each United States magistrate, a current list of the petty offenses and fines applicable thereto for which forfeiture of collateral security may be accepted.

Pursuant to the foregoing provisions, the offenses for which collateral may be posted in lieu of appearance by the person charged with the said offense are as follows:

NATIONAL PARK SERVICE VIOLATIONS

Title 36, Chapter I, Code of Federal Regulations

Section Number	*Offense*	*Collateral*
2.1(a)	Abandonment of vehicle or other property	$ 25.00
2.1(b)	Unauthorized leaving of vehicle or other property unattended more than 24 hours	25.00
2.2	Unauthorized or prohibited use of aircraft, and parachute deliveries, except in emergencies	25.00
2.3(a)	Prohibited use of an audio or noise-producing device	25.00
2.3(b)	Unauthorized use of public address system	25.00
2.3(c)	Unauthorized installation of aerials and other special radio, telephone, and television equipment	25.00
2.4	Begging; hitchhiking; soliciting without permit	25.00
2.5	Unauthorized camping; violation of camping regulations	25.00
2.6	Failure to abide by posted signs regarding closed areas and visiting hours	25.00
2.8(a) (b) (c)	Failure to restrain or keeping dogs, cats, and other pets in place where prohibited	25.00
2.9(b)	Unauthorized use or possession of fireworks and firecrackers	15.00
2.10	Giving false report regarding accident or law violation	25.00
2.11	Unauthorized possession of firearms, traps, seines, weapons for destroying animal life	25.00
2.12(a) (c)	Unauthorized or unsafe kindling of fire; leaving fire not completely extinguished or unattended	25.00
2.13(a)	Violation of any fishing laws and regulations of State or legal subdivision	25.00
2.13(c-k)	Violation of general fishing regulations	25.00

Section Number	*Offense*	*Collateral*
2.16(c)	Possession of intoxicants by minors	25.00
2.17	Failure of finder to turn in lost articles	15.00
2.18	Unauthorized picnicking	15.00
2.19	Unauthorized operation or use of portable engine or motor driven equipment	25.00
2.20	Minor violations (such as flower picking) of regulations for preservation of public property, natural features, curiosities, and resources	15.00
2.21	Holding public meeting, assembly, gathering, demonstration, or parade without permit or in violation of conditions stated therein	50.00
2.22	Failure to report incidents resulting in personal injury or property damage	25.00
2.23	Use of horses and other saddle or pack animals at places or in manner not permitted by regulations	25.00
2.24	Disposal of garbage, waste, and rubbish, and other conduct in violation of sanitary regulations	25.00
2.25	Collecting scientific specimens without permit	25.00
2.26	Use of roller skates and skateboards except in places designated by signs	25.00
2.27	Conducting sports events, entertainment and other public spectator attractions without permit or in violation of conditions in permit	25.00
2.28	Swimming, bathing, and use of certain water sports equipment where prohibited	25.00
2.29	Tampering with personal property not under one's lawful control without theft or damage	50.00
2.30	Travel on national scenic trails by use of prohibited vehicles or by horseback when trails closed	50.00
2.31	Water skiing where prohibited or in violation of regulations	25.00
2.32(a) (2)	Feeding or molesting wildlife	25.00
2.33	Engaging in winter sports activity where prohibited	25.00
2.34	Violation of regulations governing use of snowmobiles	25.00
2.39(d) (1-4)	Sale and distribution of printed matter in other than designated areas	25.00
2.39(h)	Sale or distribution of printed matter without a permit, or in violation of terms or conditions of a permit is prohibited	25.00
4.1	State Laws applicable:	
	Improper passing	20.00
	Failure to dim lights	25.00
	Illegal transportation one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle	25.00
	Violation of required lighting statutes	15.00
	Failure to yield right-of-way	30.00
	Obstructed windshield	15.00
	Exceeding safe speed	25.00
	Failure to slow to avoid collision	25.00
	Unsafe tires	15.00
	Expired inspection sticker	15.00
	Violation of safety helmet requirement for operators and passengers of motorcycles (NCGS 20-140.4)	25.00
	Violation of required headlight for motorcycles statute (NCGS 20-129(c))	25.00
	Violation of required lighted taillight for motorcycles statute (NCGS 20-129(d))	25.00
4.3	Violation of regulations governing use of bicylces	25.00
4.4	Failure to give notice of commercial towing service	25.00
4.5	Driving or permitting another to drive vehicle without license, and failure to display license upon request by authorized person	40.00
4.7	Entering or leaving park by vehicle at other than established places and designated hours	25.00

Section Number	*Offense*	*Collateral*
4.8	Excessive acceleration of motor vehicle engine when stopped or approaching or leaving stopping place	25.00
4.9	Making false report to authorized investigator of accident or violation	25.00
4.10	Following a vehicle closer than is reasonable and prudent	15.00
4.11	Violation of vehicle load, weight, length, and width limitations	25.00
4.12	Use of defective muffler, muffler cut-out, or similar device	25.00
4.13(a)	Obstructing traffic by stopping or leaving vehicle unattended	50.00
4.13(b)	Obstructing traffic by improper driving	15.00
4.16	Failure to yield right-of-way	50.00
4.17	Exceeding speed limits:	
	1. 0-5 m.p.h. over applicable limit	15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
4.18(a)	Failure to comply with signs regulating parking	15.00
4.18(b)	Failure to comply with other traffic control signs	25.00
4.18(c)	Failure to obey order by authorized person directing traffic	50.00
4.19	Violation of regulation prohibiting use of motor vehicle outside established public roads or parking areas	25.00
4.20	Operation of unregistered vehicle without valid license plates; failure to display valid proof of ownership upon request of any authorized person	15.00
4.21	Operation of vehicle with unsafe brakes	25.00
5.1	Advertising within park area without permit	75.00
5.2	Sale of alcoholic beverages or intoxicants in violation of law	75.00
5.3	Unauthorized soliciting or engaging in business	25.00
5.5	Commercial photography, motion picture filming, and television or sound track production, without permit	100.00
5.6	Unauthorized use of commercial vehicles on government park area roads:	
	a. Pickup trucks, station wagons, vans and cars	25.00
	b. Trucks over one and one-half tons and semi-trailers	100.00
5.7	Constructing buildings or any public or private facilities without permit or agreement with United States	50.00
5.8	Discrimination in employment practices; failure to post notice	50.00
5.9	Discrimination in furnishing public accommodations and transportation services; failure to post notice	50.00
5.12	Installation of monument or memorial in park area without permission	25.00
5.13	Creation or maintenance of a nuisance within park area	25.00
5.14	Prospecting, mining, locating mining claims, and leasing in park areas, except as authorized by law	50.00
5.15	Residing in park areas without permit	50.00
5.16	Unauthorized use of park land for agricultural purposes or for grazing or herding of animals	50.00
6.5	Wrongful entry into areas or use of facilities without paying fee and obtaining permit when required	10.00
7.14(a)	Fishing within the Smokey Mountain National Park in violation of regulations as to places, times, bait, creel, and size limits	25.00
	Each fish in excess of creel limit	10.00
7.14(b) (1)	Possession of open beer or alcoholic beverages in undesignated areas	25.00
7.14(b) (2)	Possession of open beer or alcoholic beverages in motor vehicle in park areas	50.00
7.14(c)	Leave food, materials, containers, etc., not properly secured from wildlife	25.00
7.34(b)	Fishing within Blue Ridge Parkway area in violation of regulations as to places, times, bait, creel and size limits	25.00
	Each fish in excess of creel limit	10.00
7.34(d)	Unauthorized parking of vehicles and crossing and use of Blue Ridge Parkway by hunters	25.00

Section Number	*Offense*	*Collateral*
7.34(f)	Commercial hauling on Blue Ridge Parkway without special permit, or violation of restrictions in such permit	25.00
7.34(g)	Use of commercial passenger-carrying buses on Blue Ridge Parkway without special written permit	25.00
7.34(k)	Use of bicycles on Blue Ridge Parkway except on designated and posted trails	15.00
7.34(l)	Use of boats or vessels on waters of Blue Ridge Parkway	25.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	*Offense*	*Collateral*
2.7	Disorderly conduct	
2.9(a)	Unauthorized use or possession of explosives	
2.11	Unauthorized use of firearms, traps, and other weapons capable of destroying animal life	
2.12(b) (d) (e) (f)	Unauthorized or unsafe kindling of fire and smoking where prohibited	
2.14	Fraudulently obtaining food, lodging or other accommodations	
2.15	Gambling; operation of gambling devices	
2.16(a)	Intoxication in park area	
2.16(b)	Sale of intoxicants to minors	
2.20	Major violations of regulations for preservation of public property, natural features, curiosities, and resources	
2.29	Tampering with or unlawful possession of personal property not under one's lawful control with result of theft or damage	
2.32(a) (1) (b) (2) (c)	Hunting, trapping, capturing, or killing wildlife	
2.37(b) (1) (2)	Delivery or possession of controlled substance, except as authorized by law	
2.37(b) (3)	Being in park area under influence of controlled substance	
2.39(g)	Persons engaged in sale or distribution of printed matter shall not obstruct or impede pedestrians or vehicles, harass park visitors with physical contact or persistent demands, misrepresent the purposes or affiliations of those engaged in the sale or distribution, or misrepresent whether the printed matter is available without cost or donation	
4.1	State Laws applicable: 1. Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) G.S. 20-141.3 2. Passing stopped school, activity, or church bus 3. Illegal transportation of liquor (more than one quart) 4. Any violation of the Financial Responsibility Laws (Chapter 20, Articles 9A and 13) 5. Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire 6. Driving with false, forged or altered driver's license, or permitting an owned vehicle to be so operated. Driving while license suspended or revoked, or permitting . . . so operated (G.S. 20-28; G.S. 20-34) 7. Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates 8. Any violation resulting in personal injury 9. Any violation involving a false affidavit, or false statement under oath, or perjury (G.S. 20-17(5); G.S. 20-31; G.S. 20-313.1)	
4.6	Driving under influence of intoxicants or drugs	
4.14	Careless or reckless driving	
4.15	Failure to report vehicle accident; leaving scene	
4.17	Speeding 21 m.p.h. or more over applicable limit	
	All pleas of not guilty	
	All felonies	
	Any violation charged in the same warrant or summons with a mandatory appearance violation	

NATIONAL FOREST SERVICE VIOLATIONS

Title 36, Chapter II, Code of Federal Regulations

Section Number	*Offense*	*Collateral*
261.5(d)	Leave fire without completely extinguishing	$ 25.00
261.6(a) (Minor)	Unauthorized cutting, damaging, marking, or removing timber or other forest products	25.00
261.6(b)	Cutting any standing tree, under permit or contract, before marked or otherwise designated	25.00
261.6(e)	Loading, removing, or hauling any timber or other forest product not properly identified	25.00
261.8(b)	Simple possession of firearm	25.00
261.8(c)	Simple possession of equipment which could be used for hunting, fishing, or trapping	25.00
261.8(d)	Possess dog not on leash or otherwise confined	25.00
261.9(a) (Minor)	Mutilating, defacing, removing, disturbing, injuring, or destroying any natural feature or any property of U. S.	25.00
261.9(b) (Minor)	Removing, destroying or damaging any plant that is classified threatened, endangered, rare or unique species	25.00
261.10(c)	Selling or offering for sale any unauthorized merchandise	25.00
261.10(e)	Abandoning a vehicle, animal or personal property	25.00
261.10(f)	Placing vehicle or other object on land in a manner causing impediment or hazard	25.00
261.10(g)	Distributing advertising materials without consent	25.00
261.10(h)	Unauthorized use of audio or noise-producing devices	25.00
261.10(i)	Unauthorized use of public address system	25.00
261.10(j)	Conducting, demonstrating, or participating in public meeting, assembly, etc., without permit	25.00
261.11(b)	Possess or leave refuse, debris, or litter in exposed or unsanitary condition	25.00
261.11(c) (Minor)	Placing harmful pollutants or objectionable wastes in or near stream, lake or other water	25.00
261.11(d)	Failing to dispose of all garbage or rubbish properly	25.00
261.11(e)	Dumping or leaving in refuse container, dump, etc., refuse, debris, or litter from private property	25.00
261.12	The following are prohibited on forest development roads and trails:	
	(a) Violation of load, weight, height, length or width limitation prescribed by state law except by permit	25.00
	(b) Fail to have vehicle weighed at weighing station	25.00
	(c) Fail to stop vehicle when directed by forest officer	25.00
	(d) Damaging and leaving in damaged condition any road, trail, or segment thereof (Minor offense)	25.00
	(e) Blocking, restricting, or otherwise interfering with use of a road, trail or gate	25.00
	(f) Using motorized vehicles in excess of 40 inches in width on a trail	25.00
261.13	Use of vehicles off roads prohibited as follows:	
	(a) Without valid license as required by State	25.00
	(b) Without operable braking system	25.00
	(c) Not equipped with working head and taillights as required by State	25.00
	(d) In violation of applicable noise emission standard established by Federal or State	25.00
	(f) Creating excessive or unusual smoke	25.00
261.14	The following are prohibited at Developed Recreation Sites:	
	(a) Occupying any portion of site for other than recreation purposes	25.00
	(b) Building, attending, maintaining or using fire outside fire ring, stove, grill or fireplace	25.00
	(c) Unauthorized cleaning or washing any personal property, fish, animal, or food at a hydrant or water faucet not provided for that purpose	25.00

Section Number	*Offense*	*Collateral*
	(d) Discharging or igniting a firecracker, rocket, or other firework or explosive (Minor offense)	25.00
	(e) Occupying between 10 p.m. and 6 a.m. a place designated for day use only	25.00
	(f) Failing to remove all camping equipment or personal property when vacating area or site	25.00
	(g) Unauthorized placing, maintaining, or using camping equipment	25.00
	(h) Fail to occupy camping area during first night after camping equipment set up without permission	25.00
	(i) Leave camping equipment unattended for more than 24 hours without permission	25.00
	(j) Bring in or possess animal, other than seeing eye dog, unless crated, caged, leashed, or otherwise under physical restrictive control	25.00
	(k) Bring in or possess animal in swimming area	25.00
	(l) Bring in or possess a saddle, pack, or draft animal, except as authorized	25.00
	(m) Operate or park motor vehicle or trailer except in designated spaces	25.00
	(n) Unauthorized operation of bicycle, motorbike, or motorcycle on a trail	25.00
	(o) Driving bicycles, motorbikes, and motorcycles on roads in recreation sites for other than ingress or egress	25.00
	(p) Distributing handbill, circular, paper or notice without permit	25.00
	(q) Deposit any body waste except into receptacles provided for that purpose	25.00
261.15	Failure to pay established entrance or recreation use fees as directed	10.00
261.16	The following are prohibited in a National Forest Wilderness:	
	(a) Possessing or using a motor or motorized equipment except small battery-powered, hand-held devices	25.00
	(b) Possessing or using a hang glider or bicycle	25.00
	(c) Landing aircraft; dropping or picking up any material, supplies, or person from aircraft except by permit or authorization	25.00
WHEN PROVIDED BY AN ORDER THE FOLLOWING ARE PROHIBITED:		
261.53	Going into or being upon any area which is closed for protection of:	
	(a) Threatened, endangered, rare, unique or vanishing species of plants, animals, birds or fish	25.00
	(b) Special biological communities	25.00
	(c) Objects or areas of historical, archeological, geological or paleontological interest	25.00
	(d) Scientific experiments or investigations	25.00
	(e) Public health or safety	25.00
	(f) Property	
261.54	Forest development roads:	
	(a) Using any type of vehicle prohibited by Order	25.00
	(b) Use by any type traffic prohibited by Order	25.00
	(c) Using a road for commercial hauling without a permit or written authorization	25.00
	(d) Operating vehicle in violation of speed, load, weight, height, length, width or other limitation specified by Order	25.00
	(e) Being on the road	25.00
261.55	Forest development trails:	
	(a) Being on the trail	25.00
	(b) Using a bicycle or motorized vehicle	25.00
	(c) Possessing or using a saddle, pack or draft animal	25.00
	(d) Shortcutting a switchback	25.00

Section Number	*Offense*	*Collateral*
261.56	When provided by an order, it is prohibited to possess or use a vehicle off forest development roads	25.00
261.57	National Forest Wilderness:	
	(a) Entering or being in the area	25.00
	(b) Possessing camping or pack-outfitting equipment, as specified in the order	25.00
	(c) Simple possession of a firearm or firework	25.00
	(d) Possessing any non-burnable food or beverage containers, including deposit bottles, except for non-burnable containers designed and intended for repeated use	25.00
	(f) Storing equipment, personal property or supplies	25.00
	(g) Disposing of debris, garbage, or other waste	25.00
(Minor)	Occupancy and use:	
261.58	(a) Camping for a period longer than allowed by order	25.00
	(b) Entering or using a developed recreation site or portion thereof	25.00
	(c) Entering or remaining in a campground during night periods prescribed in order except for persons who are occupying such campgrounds	25.00
	(d) Occupying a developed recreation site with prohibited camping equipment	25.00
	(e) Camping	25.00
	(f) Using a campsite or other area by more than number of users allowed by order	25.00
	(g) Parking or leaving a vehicle in violation of a posted sign	25.00
	(h) Parking or leaving a vehicle outside a parking space assigned to one's own camp unit	25.00
	(i) Possessing, parking, or leaving more than two vehicles, except motorcycles or bicycles, per camp unit	25.00
	(k) Entering or being in a body of water	25.00
	(l) Being in the area after sundown or before sunrise	25.00
	(m) Discharging a firearm, air rifle, or gas gun	25.00
	(n) Possessing or operating a motorboat	25.00
	(o) Water skiing	25.00
	(p) Storing or leaving a boat or raft	25.00
	(q) Operate watercraft in excess of posted speed limit	25.00
	(r) Launching boat except at designated launching ramp	25.00
	(s) Possessing or transporting a bird or animal	25.00
	(t) Possessing or transporting any part of a tree or a plant	25.00
	(u) Being in the area between 10 p.m. and 6 a.m. except a person who is camping or who is visiting person camping in that area	25.00

TRAFFIC OFFENSES TO WHICH NORTH CAROLINA LAW IS APPLICABLE

Section Number	*Offense*	*Collateral*
A.	Speeding violations:	
	1. 0-5 m.p.h. over applicable limit	15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
B.	Other violations:	
	Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
	Driving wrong way on dual-lane highway	40.00
	Litterbugging	30.00
	Improper passing	25.00
	Failure to dim lights	25.00
	Illegal transportation of one (1) quart or less taxpaid alcoholic bever-	

Section Number	*Offense*	*Collateral*
	age with seal broken in passenger area of motor vehicle [N.C.G.S. 18-51(1)]	25.00
	Driving too slowly	20.00
	Exceeding a safe speed	15.00
	Following too closely	15.00
	Failure to stop for red light or stop sign	15.00
	Failure to yield right-of-way	15.00
	Improper turn and/or improper signal	15.00
	Driving wrong way on one-way city street	15.00
	Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
	Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

Section Number	*Offense*
261.3	Interfering with forest officer
261.4	Disorderly conduct:
	(a) Engaging in fighting, or in threatening or abusive behavior
	(b) Inciting or participating in a riot
	(c) Making unreasonable noise
261.5	Fire:
	(a) Carelessly or negligently throwing or placing any burning, glowing, or ignited substance, or any other substance or thing which may cause a fire, into any place where it might start a fire
	(b) Firing any tracer bullet or incendiary ammunition
	(c) Causing timber, trees, slash, brush, or grass to burn except as authorized by permit
	(e) Allowing a fire to escape from control
	(f) Building, attending, maintaining, or using campfire without removing all adjacent flammable material
261.6	Timber and other forest products:
(Major)	(a) Unauthorized cutting, damaging, marking, or removing timber or other forest products
(Major)	(b) Cutting any standing tree, under permit or contract, before marked or otherwise designated
	(c) Removing any timber or other forest product to undesignated place for scaling; or removing from designated place before scaled, measured, counted, or otherwise accounted for by forest officer
	(d) Stamping, marking with paint, or otherwise identifying for cutting any tree or other forest product in a manner similar to that employed by forest officers
(Major)	(e) Loading, removing or hauling any unidentified timber or other forest product acquired under permit or timber sale contract
	(f) Selling or exchanging timber or other forest product obtained under free use
	(g) Violation of any timber export or substitution restriction
261.7	Livestock:
	(a) Placing or allowing unauthorized livestock to enter or be in National Forest System
	(b) Failing to remove unauthorized livestock when requested to do so by forest officer
	(c) Failing to reclose any gate or other entry
	(d) Molesting, injuring, removing or releasing any impounded livestock in the custody of the Forest Service or its authorized agents
261.8	Fish and wildlife:
	(a) Hunting, trapping, fishing, catching, molesting, killing or having in possession any kind of wild animal, bird, or fish, or taking the eggs of any such bird
(Major)	(b) Possessing a firearm or other implement designed to discharge a missile capable of destroying animal life

Section Number	*Offense*
(Major)	(c) Possessing equipment which could be used for hunting, fishing or trapping
261.9	Property:
(Major)	(a) Mutilating, defacing, removing, disturbing, injuring, or destroying any natural feature or any property of U.S.
(Major)	(b) Removing, destroying, or damaging any plant that is classified threatened, endangered, rare or unique species
	(c) Entering any building or structure which is not open to the public
	(d) Unauthorized use of any herbicide, pesticide or fungicide
	(e) Digging in, excavating, disturbing, injuring, or destroying any archeological, paleontological, or historic site, or removing, disturbing, injuring or destroying an object in such site
261.10	Occupancy and use:
	(a) Constructing, placing, or maintaining any kind of improvement without a permit
	(b) Squatting or making settlement on Forest Service land
	(d) Discharging a firearm or any other implement capable of taking human life, causing injury, or damaging property
261.11	Sanitation:
	(a) Depositing in any toilet, toilet vault, or plumbing fixture any substance which could damage or interfere with operation or maintenance of fixture
(Major)	(c) Placing harmful pollutants or objectionable wastes in or near stream, lake or other water
261.12	Forest development roads and trails:
(Major)	(d) Damaging and leaving in damaged condition any road, trail, or segment thereof
261.13	Use of vehicles off roads:
	(e) Operate motor vehicle while under the influence of alcohol or other drug
	(g) Operate motor vehicle carelessly, recklessly, or without regard for the safety of any person, or in a manner that endangers, or is likely to endanger, any person or property
261.14	Developed recreation sites:
(Major)	(d) Discharging or igniting a firecracker, rocket, or other firework or explosive

WHEN PROVIDED BY AN ORDER THE FOLLOWING ARE PROHIBITED:

261.52	Fire:
	(a) Building, maintaining, attending, or using a fire, campfire, or stove fire
	(b) Using an explosive
	(c) Smoking
	(d) Smoking, except inside a building or vehicle, or while seated in an area at least 3 feet in diameter that is barren or cleared of all flammable materials
	(e) Going into or being upon an area
	(f) Possessing, discharging or using any kind of firework or other pyrotechnic device
	(g) Entering an area without any firefighting tool prescribed by order
	(h) Operating an internal combustion engine except on a road
	(i) Welding or operating acetylene or other torch with open flame
	(j) Operation of any internal or external combustion engine on any timber, brush, or grass covered land, not properly equipped with spark arrester
	(k) Violating any state law concerning burning, fires, or which is for the purpose of preventing or restricting the spread of fires
261.57	National Forest Wilderness:
(Major)	(c) Possessing a firearm or firework

Section Number	*Offense*
	(e) Grazing
(Major)	(g) Disposing of debris, garbage, or other waste
261.58	Occupancy and use:
	(j) Being publicly nude
(Major)	(m) Discharging a firearm, air rifle, or gas gun

STATE LAWS APPLICABLE:

All pleas of not guilty
All felonies
Any violation resulting in personal injury
Driving under the influence [N.C.G.S. 20-138; 20-139]
Exceeding the applicable speed limit by over 21 m.p.h.
Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) [N.C.G.S. 20-141.3]
Passing stopped school, school activity, or church bus
Failure to yield right-of-way to emergency vehicles
Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire
Any violation charged in the same warrant or summons with a mandatory appearance violation
Illegal transportation of liquor (more than one quart)
Leaving the scene of an accident in which involved, or failing to report such an accident [N.C.G.S. 20-166; 20-166.1]
Driving while license suspended or revoked, or permitting an owned vehicle to be so operated [N.C.G.S. 20-28; 20-34]
Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated [N.C.G.S. 20-28; 20-34]
Any violation of the Financial Responsibility Laws [Chapter 20, Articles 9A and 13]
Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates
Any violation involving a false affidavit, or false statement under oath, or perjury [N.C.G.S. 20-17(5); 20-31; 20-313.1]
Careless and reckless driving [N.C.G.S. 20-140; 20-140.1]

NATIONAL FISH AND WILDLIFE VIOLATIONS

Title 50, Chapter I, Code of Federal Regulations and Title 16 United States Code

Section Number	*Offense*	*Collateral*
THE MIGRATORY BIRD TREATY ACT:		
16 USC 703	Take or possess migratory non-game birds	$ 50.00
	Each bird so possessed	10.00
MIGRATORY GAME BIRDS:		
20.21(a)	Take migratory game birds with illegal device or substance	100.00
20.21(b)	Take migratory game birds with unplugged shotgun capable of holding more than three shells	50.00
20.21(c-h)	Take migratory game birds from or with use of unlawful means such as, but not limited to, sinkboxes, motor vehicles, motor boats, live birds as decoys, electrically amplified bird calls	100.00
20.21(i)	Take migratory game birds by the aid of bait, or on, or over baited area	200.00
	Miscellaneous regulations adopted for special areas or conditions	50.00
20.23	Take migratory game birds less than one hour before or after hours open to shooting	100.00
20.24		
20.33	Exceeding daily bag or possession limit	100.00
20.34		
20.35	Each bird in excess of limit	25.00

Section Number	*Offense*	*Collateral*
20.25	Failure to retrieve killed or crippled birds	100.00
	For each bird not retrieved	25.00
20.31	Possessing migratory game birds taken in violation of sections 20.21 — 20.25	100.00
20.22 and	Take or possess freshly killed migratory game birds during closed season	150.00
	Each bird so possessed	25.00
20.37 and	Receiving or having custody of untagged migratory game birds belonging to another — each bird	25.00
20.38	Possessing or transporting live migratory game birds taken pursuant to these regulations	100.00
	Each bird so possessed or transported	25.00
MIGRATORY BIRD HUNTING STAMP ACT:		
16 USC 718 (a)(e) 71.2(b)	Take migratory waterfowl without valid Federal migratory bird hunting stamp (commonly called Duck Stamp), and related violations	25.00
MIGRATORY BIRD CONSERVATION ACT — NATIONAL WILDLIFE REFUGE: 16 USC 715 National Wildlife System — Title 50, Subchapter C, Part 26, Code of Federal Regulations		
25.42	Failure to exhibit permits upon request by authorized officer	25.00
26.21(a)	Trespassing on any wildlife refuge area	25.00
26.21(b)	Unlawfully permitting domestic animals to enter upon or roam at large in wildlife refuge area	25.00
26.22	Unauthorized entering, occupying, using, or being upon wildlife refuge area	25.00
26.36	Conducting public meetings, assemblies, demonstrations, parades, etc., without permit	25.00
27.31(c-m)	Operation of motor vehicles in wildlife refuge area; violation of regulations	50.00
27.32	Unauthorized use of boats in wildlife refuge area	15.00
27.33	Water skiing in violation of regulations	25.00
27.34	Unauthorized operation of aircraft at low altitudes or unauthorized landing of aircraft except in emergencies	25.00
27.41	Unauthorized carrying, possessing, or discharging firearms, fireworks, explosives	15.00
27.42	Unauthorized possession, transportation, or use of firearms	100.00
27.43	Unauthorized use and possession of crossbows, bow and arrow, air guns, or other weapons on wildlife refuge area	25.00
27.51 (Minor)	Molesting, disturbing, damaging, or destroying plant or animal life on wildlife refuge area	15.00
27.61	Destruction, defacement, or removal of public property from wildlife refuge area	50.00
27.65	Tampering with motor vehicle, boat, equipment or machinery	100.00
27.71	Unauthorized making of motion or sound pictures	100.00
27.72	Operation of electrical sound equipment in a manner disturbing to animal life or persons in wildlife refuge area	25.00
27.73	Unauthorized use of artificial light for the purpose of supporting, locating, or taking any animal in wildlife refuge area	25.00
27.81	Entering or remaining in national wildlife refuge area while under the influence of alcohol	25.00
27.83	Indecency and disorderly conduct	25.00
27.86	Begging or solicitation of funds in support of any cause or organization on wildlife refuge area	25.00
27.91	Unauthorized conducting of field trials on wildlife refuge area	25.00
27.93	Abandonment of personal property in wildlife refuge area	25.00
27.94 (Minor)	Littering and disposing of waste materials	25.00
27.95(b-d)	Building camp fires, leaving fires unattended, discarding burning cigarettes, and similar prohibited acts	25.00
27.96	Distributing advertising materials	75.00
27.97	Soliciting business or conducting commercial enterprise without authority	25.00

Section Number	*Offense*	*Collateral*
31.16	Unauthorized trapping of, attempting to trap animals on wildlife refuge area	200.00
32.2(a-d) 33.2(a-c)	Violation of general hunting regulations applicable to lawful hunting or fishing on wildlife refuge area	25.00
32.2(e) 33.2(d)	Failure to comply with terms and conditions of access or use of wildlife refuge area	25.00
32.2(f) 33.2(e)	Violation of special terms and conditions and special regulations governing hunting on wildlife refuge area	50.00

MANAGEMENT OF FISHERIES CONSERVATION AREAS — NATIONAL FISH HATCHERIES
16 USC 742a et seq.

70.4(b)	Unlawfully taking fish or other aquatic animals on National Fish Hatchery areas	100.00
70.4(c)	Unlawfully hunting, taking, or attempting to hunt or take any animal on National Fish Hatchery area	100.00
71.2(a) (d) 71.12(a) (c)	Violation of applicable State laws governing area of National Fish Hatchery	25.00
71.2(b) (c) 71.12(b)	Failure to comply with applicable provisions of Federal law and other regulations on National Fish Hatchery area	25.00
71.2(e) 71.12(d)	Failure to comply with terms and conditions of access to National Fish Hatchery area	25.00
71.2(f) 71.12(e)	Failure to comply with special notices governing hunting and fishing on National Fish Hatchery area	25.00

MANDATORY APPEARANCE VIOLATIONS

NOTE: Whoever, in violation of the Migratory Bird Treaty Act, shall:
"(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or
(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than $2,000 or imprisoned not more than two years, or both." [16 U.S.C. 707(b)]

Since this violation is a felony, forfeiture of collateral is not permissible.

20.23	Taking migratory game birds more than one hour before or after hours open to shooting
27.31(b) 27.32(b)(3)	Operating motor vehicle or boat under the influence of intoxicants or drugs
27.31(c)	Operate motor vehicle carelessly or heedlessly
27.51 (Major)	Molesting, disturbing, damaging, or destroying plant or animal life on wildlife refuge area
27.52	Introduction of plant or animal life taken elsewhere, into wildlife refuge area
27.62	Searching for or removing objects of antiquity from wildlife refuge area without authority
27.63	Searching for buried treasure, valuable rocks, stones, or mineral specimens without special permit
27.64	Prospecting for mineral deposits, filing mining claims, or removal of materials without authorization
27.82(b) (1, 2)	Delivery or possession of controlled substance, except as authorized by law
27.82(b) (3)	Being present in a national wildlife refuge area while under the influence of a controlled substance
27.84	Disturbing, molesting, or interfering with employee of U.S. or State Government engaged in official business
27.85	Gambling or operation of gambling devices in wildlife refuge area
27.92	Constructing buildings, other structures, or obstructions on wildlife refuge area
27.94 (Major)	Littering and disposing of waste materials

Section Number	*Offense*	*Collateral*
27.95(a)	Setting on fire timber, brush, grass without authorization	
32.2(g)	Use of any drug on an arrow for bow hunting, or possession of arrows employing such drugs, on any national wildlife refuge	
	Any violation charged in the same warrant or summons with a mandatory appearance violation	
	All pleas of not guilty	
	All felonies	

BLACK BASS ACT — 16 USC 851 et seq.:

	Any violation including, but not limited to, interstate transportation of black bass or other fish taken in violation of law; receiving, making false records	

CHEROKEE INDIAN RESERVATION

THE EASTERN BAND OF CHEROKEE INDIANS

QUALLA BOUNDARY

Title 18, United States Code

Section Number 1165 — Hunting, Trapping, Fishing on Indian Land

FISHING:

Section Number	*Offense*	*Collateral*
1.	Exceeding creel limit	$ 25.00
2.	Each fish in excess of creel limit	10.00
3.	Fishing without permit	25.00
4.	Snagging of fish	25.00
5.	Grabbing of fish	25.00
6.	Chumming of fish	25.00
7.	Fishing with more than one line	25.00
8.	Setting of trotline	25.00
9.	(a) Fishing in closed ponds posted "No Fishing" or "No Trespassing"	50.00
	(b) Each fish taken unlawfully from closed ponds	10.00
10.	Indian aiding and abetting principal in above offenses shall post similar collateral	
11.	Fishing on a closed stream	25.00
12.	Fishing before or after legal fishing hours	25.00
13.	Winter Fishing Program (Nov. 1 — Last day of Feb.)	
	(a) Use of bait other than artificial	25.00
	(b) Keeping fish under minimum (12") size	25.00

HUNTING:

1.	Non-Indian hunting on the reservation	200.00
2.	Indian aiding and abetting a non-Indian hunting on the reservation	200.00
3.	Small game violations:	
	(a) Excess bag limit	25.00
	(b) Each animal over bag limit	10.00
4.	Big game violations (bear and deer)	100.00

TRAPPING:

1.	Non-Indian trapping on the reservation	200.00
2.	Indian aiding and abetting a non-Indian trapping on the reservation	200.00

MANDATORY APPEARANCE VIOLATIONS

[For Section Number 1165]

1. Seining of fish
2. Selling of fish — Buying or selling of game fish
3. Gigging or spearing fish
4. Dynamiting or poisoning of fish
5. Destruction of fish in Tribal holding facilities

MANDATORY APPEARANCE VIOLATIONS

[For Section Number 1164]

1. Destroying boundary or warning signs

Traffic offenses upon North Carolina Highways traversing the Cherokee Indian Reservation (Bureau of Indian Affairs Roads excluded) to which North Carolina Motor Vehicle Laws are applicable:

Section Number	*Offense*	*Collateral*
A.	SPEEDING VIOLATIONS:	
	1. 0-5 m.p.h. over applicable limit	$ 15.00
	2. 6-10 m.p.h. over applicable limit	20.00
	3. 11-15 m.p.h. over applicable limit	25.00
	4. 16-20 m.p.h. over applicable limit	35.00
B.	OTHER VIOLATIONS:	
	Driving without, or with expired, operator's or chauffeur's license (except when revoked or suspended), or knowingly permitting an owned vehicle to be so operated	40.00
	Driving the wrong way on a dual lane highway	40.00
	Litterbugging	30.00
	Improper passing	25.00
	Failure tc dim lights	25.00
	Height and width violations	25.00
	Illegal transportation of one (1) quart or less taxpaid alcoholic beverage with seal broken in passenger area of motor vehicle [N.C.G.S. 18-51(1)]	25.00
	Driving too slowly	20.00
	Any parking violation	15.00
	Exceeding a safe speed	15.00
	Following too closely	15.00
	Failure to stop for red light or stop sign	15.00
	Failure to yield right-of-way	15.00
	Improper turn and/or improper signal	15.00
	Driving wrong way on a one-way city street	15.00
	Violation of the vehicle registration laws, except involving stolen or altered registration plates or certificates	15.00
	Any other traffic violation for which court appearance is not mandatory	15.00

MANDATORY APPEARANCE VIOLATIONS

All pleas of not guilty
All felonies
Any violation resulting in personal injury
Driving under the influence of intoxicants or drugs [G.S. 20-140; 20-140.1]
Exceeding applicable speed limit by over 21 m.p.h.
Racing (prearranged, spontaneous, permitting such use of an owned vehicle, betting on prearranged racing) [G.S. 20-141.3]
Passing stopped school bus, school activity, or church bus
Failure to yield right-of-way to emergency vehicles
Failure to obey directions of a traffic officer, or of a fireman at the scene of a fire

Illegal transportation of liquor (more than one quart)
Leaving scene of an accident in which involved, or failing to report such an accident [G.S. 20-166; 20-166.1]
Driving while license suspended or revoked, or permitting an owned vehicle to be so operated [G.S. 20-28; 20-34]
Driving with false, forged, or altered driver's license, or permitting an owned vehicle to be so operated
Any violation of the financial responsibility laws (Chapter 20, Articles 9A and 13)
Any violation of the vehicle registration laws involving stolen or altered registration plates or certificates
Any violation involving a false affidavit, or false statement under oath, or perjury [G.S. 20-17(5); 20-31; 20-313.1]
Any violation charged in the same warrant or summons with a mandatory appearance violation

GENERAL SERVICES ADMINISTRATION VIOLATIONS

Title 41, Chapter 101, Code of Federal Regulations

Section Number	*Offense*	*Collateral*
20.301	Recording presence on Federal property outside normal working hours and/or displaying identification upon request of authorized personnel	$ 25.00
20.302	Littering, disposing of rubbish on Federal property	15.00
20.303	Failure to comply with official signs and with directions of authorized officials	15.00
20.304	Disorderly conduct; obstructing use of facilities; impede or disrupt performance of official duties by Government employees	25.00
20.305	Gambling; conducting lottery or pool; selling or buying lottery tickets	25.00
20.307	Soliciting; collecting private debts; unauthorized commerical advertising; and vending	25.00
20.308	Unauthorized distribution of handbills, pamphlets, etc.; displaying of placards or posting of material on bulletin boards or elsewhere	15.00
20.309	Unauthorized taking of photographs for news, advertising or commercial purposes	15.00
20.310	Bringing animals (except seeing eye dogs) on premises for unofficial purposes	15.00
20.311	Vehicular and pedestrian traffic — Failure to comply with signals and directions; blocking entrances, driveways, etc.; unauthorized parking	15.00

MANDATORY APPEARANCE VIOLATIONS

20.302	Willful destruction, damage, or removal of Federal property or creating hazard to persons thereon
20.306	Operating a motor vehicle while under influence of alcohol or drugs; entering upon Federal property while under the influence of alcohol or drugs; use of drugs or alcoholic beverage
20.312	Carrying firearms, dangerous or deadly weapons or explosives, openly or concealed, except for official purposes
20.313	Discrimination by segregation or otherwise on the basis of race, creed, color, sex, or national origin in furnishing or refusing facilities of a public nature
	Any violation charged in the same warrant or summons with a mandatory violation
	All pleas of not guilty
	All felonies

VETERANS ADMINISTRATION FACILITIES VIOLATIONS

Title 38, Part I, Sections 1.218 and 1.219 Code of Federal Regulations

(Veterans Administration referred to as VA)

Section Number	*Offense*	*Collateral*
1.218(b)	Entry upon, or failure to leave, closed premises by unauthorized persons	$ 5.00
1.218(c)	Littering, willful damage or destruction or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government not exceeding $50	10.00
1.218(d)	Refusal to comply with prohibitory signs or directions of officials during emergencies	15.00
1.218(e)	Conduct on property which: creates loud or unusual noise; unreasonably obstructs usual use of entrances, foyers, etc.; impedes or disrupts official performance of Government employees; prevents one from obtaining medical or other services; or use of loud, abusive, or otherwise improper language; or unwarranted loitering, sleeping, or assembly	15.00
1.218(e)	Failure to leave premises when so ordered as a result of creating disturbances	15.00
1.218(f)	Gambling, conducting lottery, selling or purchasing numbers tickets	25.00
1.218(h)	Unauthorized soliciting, vending, commercial advertising, and collecting private debts	5.00
1.218(i)	Unauthorized distribution of advertising material	5.00
1.218(j)	Unauthorized photography; photography for commercial purposes	5.00
1.218(k)	Bringing animals (except seeing eye dogs) onto VA property without authorization	5.00
1.218(l)	Parking in or blocking emergency vehicle spaces or entrances; blocking access to fire hydrants or spaces reserved for physically disabled persons	15.00
1.218(l)	Failure to comply with traffic signals and directions or posted signs; blocking entrances, driveways, walks, or loading platforms, creating excessive noise	10.00
1.218(l)	Unauthorized parking in reserved locations, parking in excess of posted time limits	5.00
1.218(n)	Conducting unauthorized service, ceremony, or demonstration	15.00

MANDATORY APPEARANCE VIOLATIONS

1.218(c)	Willful destruction, damage, or unauthorized removal of Government property from VA premises or national cemeteries causing loss to Government of $50.00 or more
1.218(g) (1)	Careless and reckless driving; operating motor vehicle under the influence of alcohol or drugs; unauthorized use or possession of alcohol or drugs (not prescribed for use as medicine)
1.218(m)	Carrying firearms, dangerous or deadly weapons or explosives, except for official purposes
1.218(o)	Unauthorized opening or attempting to open locks or card-operated barrier mechanisms; unauthorized possession, manufacture, or use of keys or barrier cards which operate locks to rooms or areas
1.218(p)	Prostitution, solicitation, and sexual misconduct
	Any violation charged in the same warrant or summons with a mandatory violation
	All felonies
	All pleas of not guilty

Effect of Amendments. — The amendment by order dated June 1, 1977, rewrote this rule.

The amendment by order dated March 6, 1979, made changes in the schedule of National Park Service violations, National Fish and Wildlife violations, and Cherokee Indian Reservation violations.

The amendment filed May 10, 1982, and effective for all offenses listed which arise on or after June 1, 1982, added to § 4.1 under National Park Service Violations the provisions for violation of safety helmet requirement, violation of required headlight for motorcycles statute and violation of required lighted taillight for motorcycles statute.

Rule 13. Sessions of Grand Jury.

(1) Grand juries shall be convened in Charlotte on the first Monday in February, April, June, August, October, and December; in Asheville on the first Monday in January, March, May, July, September, and November. For the convenience of jurors, witnesses and court personnel, the grand jury convened in Charlotte shall generally pass upon indictments for the Charlotte and Statesville Divisions and shall be composed of members drawn from both Divisions; the grand jury convened in Asheville shall generally pass upon indictments for the Asheville, Bryson City, and Shelby Divisions and shall be composed of members drawn from those Divisions.

(2) All grand juries shall consist of nineteen (19) members, who shall serve for a 12-month period, and shall have authority to pass upon indictments for all crimes committed within this district regardless of the Division in which such juries may sit.

Editor's Note. — This rule was adopted by order dated October 31, 1975.

Rule 14. Additional Duties of Magistrates.

In accordance with Rule 83, Federal Rules of Civil Procedure, and Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of 28 U. S. C. § 636(b), the following additional duties are hereby specified for the United States Magistrates for the Western District of North Carolina, when directed by the Court: Conduct post-indictment arraignments, and ordering a pre-sentence report on a defendant who signifies the desire to plead guilty.

In accordance with Rule 57, Federal Rules of Criminal Procedure, and specifically, pursuant to the provisions of 28 U.S.C., § 636(b), the following additional duty is hereby specified for the United States Magistrates, United States District Court, Western District of North Carolina: Receive true bills of indictment returned by the grand jury in open court and receive reports of no true bills from the foreman of the grand jury in writing, pursuant to Rule 6(f), Federal Rules of Criminal Procedure, as amended August 1, 1976.

Editor's Note. — The first paragraph of this rule was adopted by order dated October 31, 1975, and the second paragraph was adopted by order dated September 23, 1976.

Rule 15. Rule for Custody and Disposition of Models, Exhibits, and Depositions.

Custody

All models, diagrams, exhibits, depositions and other material admitted in evidence or filed in any cause shall be placed in the custody of the clerk, unless otherwise ordered by the court.

Removal

All models, diagrams, exhibits, depositions, or other material placed in the custody of the clerk shall be removed by the party offering such evidence, or filing such materials, within 30 days after the expiration of the time for appeal from final judgment, unless otherwise directed by the Court. At the time of

removal, a detailed record of the disposition shall be filed in the case jacket.

If the party offering, or filing, models, diagrams, exhibits, depositions or other material fails to remove such materials as provided herein, the clerk shall write the attorney of record, of [or] if none, the party offering the evidence, calling attention to the provisions of this rule. If after the mailing of such notice the materials have not been removed within 30 days, they may be destroyed by the clerk.

Editor's Note. — This rule was adopted by order dated July 22, 1977, effective August 1, 1977.

II. Bankruptcy Rules

Automatic Reference of Chapter X Bankruptcy Cases.

Effective August 1, 1975, all Chapter X cases then pending are hereby referred and thereafter the Clerk shall, on the filing of a Chapter X petition, refer the case forthwith to the referee as bankruptcy judge. Thereafter, all proceedings in the Chapter X cases shall be before the referee except that:

(1) A district judge may, at any time, for the convenience of parties or other cause, withdraw a case in whole or in part from a referee and either act himself or assign the case or part thereof to another referee in the district; or where

(2) It appears to a referee in a contempt proceeding under Rule 920 that conduct prohibited by Section 41a of the Bankruptcy Act may warrant punishment by imprisonment or by a fine of more than $250.00, he may certify the facts to the district judge who shall then proceed as for a contempt not committed in his presence; or where

(3) A complaint seeks an injunction to restrain a court (which may be issued by the judge only); or where

(4) The office of referee is vacant or its occupant is temporarily absent or disqualified to act or whenever the expeditious transaction of the business of the court or courts of bankruptcy may require, the judge, or any one of the judges may act; or any of the other contingencies set forth in Section 43c of the Bankruptcy Act apply; or where

(5) An appeal is taken to the district court pursuant to Part VIII of the Federal Rules of Bankruptcy Procedure.

Editor's Note. — This rule was adopted by order filed June 18, 1975, effective Aug. 1, 1975.

(3A) United States Bankruptcy Court for the Western District of North Carolina

Rule
1. Persons Who May Practice before the Bankruptcy Court.
2. Time Limit for Amending or Objecting to Exemption Election.
3. Chapter 11 Interim Fee Procedure.
4. Required Matrix and Number of Copies of Petition and Other Documents.
5. Requirements for Payment of Filing Fees in Installments.
6. Payments to Creditors in Chapter 13 Individual's Debt Adjustment Cases.
7. Notices Required to Be Sent by Chapter 11 Debtors.
8. Required Number of Copies of Orders or Judgments Tendered to the Court.
9. Filing of Attorney Fee Disclosure Statement.
10. Filing of Claims in Chapter 13 Proceedings.
11. Procedure for Objecting to or Confirming Chapter 13 Plans.
12. Service on Parties.
13. Income Tax Refunds.
14. Final Hearings on Requests for Relief from Stay.
15. Extent of an Attorney's Duty to Represent.

Editor's Note. — These rules were adopted Sept. 16, 1983, and became effective on that date.

RULE 1

PERSONS WHO MAY PRACTICE BEFORE THE BANKRUPTCY COURT

(a) Those persons who are admitted to practice before the United States District Court for the Western District of North Carolina will be allowed to practice law before this Court. For purposes of this Rule, "practice law" includes, but is not limited to, preparing complaints, preparing petitions, preparing applications, preparing motions, questioning witnesses in proceedings before the Judge, and pursuing any action of any nature in this Court (but does not include questioning debtors at a meeting of creditors or at other administrative hearings). All individuals, businesses, partnerships, and corporations that desire to appear in proceedings before this Court must be represented by a lawyer duly admitted to practice before this Court. Otherwise licensed attorneys may be permitted by the Court to appear on an ad hoc basis.

The following exceptions shall apply:

1. An individual may represent himself.
2. An individual may represent a non-incorporated business if said individual is the sole proprietor of said business.
3. An individual may represent himself or any other entity at a meeting of creditors; however, any objection or petition that must be formally pursued before the Court, although raised at a meeting of creditors, must be pursued by an attorney admitted to practice before this Court.

Cross References. — See also the Bankruptcy Rules adopted by the United States Supreme Court, which became effective Aug. 1, 1983, and which are set forth in Volume 103, No. 14, of the Supreme Court Reporter.

RULE 2

TIME LIMIT FOR AMENDING OR OBJECTING TO EXEMPTION ELECTION

I. The debtor shall have up to and including the first day first set for the § 341 (a) meeting of creditors in which to amend his exemption election, after which the exemption election shall be final as against the debtor; provided, however, that the trustee and any party in interest shall have up to and including the thirtieth (30th) day following the day first set for the 341 (a) meeting of creditors in which to object to the debtor's exemption election.

II. Any amendments or objections to exemption elections other than as allowed in (I.) shall be with leave of Court only.

Editor's Note. — The "§ 341(a) meeting" referred to in subdivision I is the meeting provided for in 11 U.S.C. § 341(a).

RULE 3

CHAPTER 11 INTERIM FEE PROCEDURE

I. Establishment of Procedure
   (a) No application for interim compensation shall be considered by the Court unless the requirements of 11 U.S.C. Section 331 are met.

II. Dates of Hearings on Fee Applications
   (a) In cases venued in the Charlotte Division, fees will be considered on the last Thursday in April, July, October, and January at 9:30 A.M.
   (b) In cases venued in Asheville, Statesville, and Shelby, fees will be considered during the first full day of the Bankruptcy Court calendar in that Division at 9:30 A.M. in April, July, October, and January.
   (c) Fee applications are to be scheduled for hearing in the Division in which the case is venued unless the applying party has made application to the Court and been granted an order directing otherwise.

III. Service of Application and Notice of Hearing
   (a) In all cases, applications for interim fees will be served by the applying party on the debtor and the debtor's counsel.
   (b) In all cases in which there is a committee of equity security holders, or a committee of unsecured creditors or other court appointed committee, a copy of the application shall be served on the chairman of each such committee and on its counsel if such has been appointed.
   (c) If a trustee has been appointed, a copy of the application shall be served on the trustee.
   (d) Copies of the application must be served on the required parties and filed with the Court along with a Certificate of Service 20 days prior to the date on which the application is scheduled for hearing. Late filed applications or those without Certificate of Service attached will be denied by the Court without hearing.
   (e) In addition to a copy of the application, the parties set out above together with any parties who have requested notices pursuant to Rule 2002(i) are to be served with notice of the time and place of the hearing, the identity of the applicant, the amount requested, their opportunity to be heard at said time, and their right to file specific written objections to the applied for fees with the Court prior to the hearing.

(f) Four copies of the application must be filed with the Court.

IV. Structure of Fee Application
(a) Each application must have attached a detailed statement of services, times, and charges that comprise the total requested. It should further show the nature of the service and why each particular service was necessary to the case. In addition, the application should disclose prior interim fees and expenses allowed and prior interim fees and expenses paid.

V. Attendance at Hearing
(a) The applying party is to be present in Court on the day and time set for hearing on the application and be prepared at that time to answer questions, on the record, concerning the activities for which fees are requested and the necessity for same.

Editor's Note. — Rule 2002(i), referred to in subdivision III (e), is contained in the Bankruptcy Rules adopted by the Supreme Court, which became effective Aug. 1, 1983.

RULE 4

REQUIRED MATRIX AND NUMBER OF COPIES OF PETITION AND OTHER DOCUMENTS

I. Required number of copies of petitions and attached lists, schedules, statements, claims of exemption and subsequent amendments thereto:
a) Chapter 7 or Chapter 13: The original document plus three copies
b) Chapter 9 or Chapter 11: The original document plus five copies.

II. Monthly Financial Reports for Debtors and Operating Trustees
a) The original document plus two copies must be filed.

III. Copies stamped FILED
a) Any person requesting filed copies of documents for their office records must submit copies in addition to those required in I and II above along with a stamped, self-addressed envelope.

IV. Requirement of Master Mailing Matrix
a) As a requirement of filing, all bankruptcy petitions must be accompanied by an alphabetized matrix containing the names and addresses of all parties in interest, including the debtor, debtor's attorney, creditors and appropriate governmental agencies.
b) The matrix shall be prepared according to the forms and instructions provided upon request by the Clerk's office.
c) The matrix shall be certified as accurate by the filing attorney or party and such party shall be responsible for any errors in or omissions from the listings.

Editor's Note. — Chapters 7, 9, 11, and 13, referred to in subdivision I, are provisions of Title 11 of the United States Code.

RULE 5

REQUIREMENTS FOR PAYMENT OF FILING FEES IN INSTALLMENTS

I. No petition on behalf of an individual shall be accepted for filing by the Clerk unless it is accompanied by full payment of the filing fee or a properly completed application to pay fees in installments.

a) To be deemed complete the application must
   1) Set out why the debtor cannot pay the full fee at the time of filing.
   2) Set out a payment schedule that complies with the requirements of Rule 1006(b)(2).
   3) Contain a statement that the debtor's attorney has received no payment for fees and will accept none until the filing fees are paid in full.
   4) Contain a statement that the debtor does not owe any outstanding fees to the Court on account of any other prior proceeding.
   5) Be signed by both the debtor and the debtor's attorney.

II. Action on Application

a) Following the filing of a petition and application, each application will be reviewed by the Court and an order entered granting or denying the application. Should the application be denied, the debtor shall have ten (10) days from the date of the order to pay the full fee. If the full fee is not paid within ten (10) days of the order, the petition will be dismissed by the Court without any further prior notice.

III. Action upon failure to make payments

a) The debtor and the debtor's attorney are responsible for knowing the dates payments are due. The Clerk's office will not send reminders or notices.

b) Upon the failure to make any payment as scheduled, the petition is subject to dismissal after hearing on notice to the debtor and trustee. Under no circumstances shall the failure of the Court to dismiss for a missed or late payment be deemed to be acquiescence in or forgiveness of such action.

c) In Chapter 13 proceedings filing fees must be paid directly to the Clerk and may not be paid through the Standing Trustee, whether the payments are in full or installments.

Editor's Note. — Rule 1006(b)(2), referred to in subdivision I a 2, is contained in the Bankruptcy Rules adopted by the Supreme Court, which became effective Aug. 1, 1983.

The reference in subdivision III c to "Chapter 13" refers to Chapter 13 of Title 11 of the United States Code.

RULE 6

PAYMENTS TO CREDITORS IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES

Chapter 13 Standing Trustees are authorized to make payments to creditors in amounts smaller than $15.00 without waiting for that creditor's dividends to accumulate to $15.00. The decision as to whether to make smaller payments shall be made in each case by the Trustee and such decision shall be solely the Trustee's discretion as to the best administration of the individual estate.

Editor's Note. — The reference to "Chapter 13" refers to Chapter 13 of Title 11 of the United States Code.

RULE 7

NOTICES REQUIRED TO BE SENT BY CHAPTER 11 DEBTORS

In Chapter 11 proceedings, the debtor in possession shall be responsible for mailing the following notices and documents to creditors, after having their form and content approved by the Clerk's Office, and for filing a Certificate of Mailing with the Clerk's Office within five (5) days of the date of the mailing;

1) notice of the meeting of creditors
2) notice of the hearing on disclosure statement
3) the plan
4) the disclosure statement
5) notice regarding balloting and date for hearing on confirmation
6) any other notices as the Court or Clerk shall direct in a particular proceeding.

Court Comment. — This supplements Rule 3017.

Editor's Note. — The reference to "Chapter 11" refers to Chapter 11 of Title 11 of the United States Code.

RULE 8

REQUIRED NUMBER OF COPIES OF ORDERS OR JUDGMENTS TENDERED TO THE COURT

Any order or judgment that is tendered to the Court for consideration shall have attached a sufficient number of copies for service on all parties required to receive notice of such order or judgment. Orders tendered without sufficient copies will not be considered until such time as the required copies are also tendered.

RULE 9

FILING OF ATTORNEY FEE DISCLOSURE STATEMENT

The disclosure of attorney compensation required by 11 U.S.C. Section 329 must be filed with the Court within fifteen (15) days of the date the original petition is filed.

Court Comment. — This supplements Rule 2016(b).

RULE 10

FILING OF CLAIMS IN CHAPTER 13 PROCEEDINGS

I. Filing Claims

A. Proofs of claim in Chapter 13 proceedings shall be filed directly with the office of the standing trustee to whom the case is assigned. The address of the proper standing trustee will be shown on the notice of creditors meeting. Claims will be dated and stamped as received as of the date they arrive in the trustee's office and the claim shall be deemed filed with the Court as of that date.

II. Claims Docket

A. The staff of the Chapter 13 Trustee shall prepare a claims docket for each proceeding referred to that trustee and such claims docket shall be transferred to the Clerk's Office and made a part of the permanent record at the closing of the case along with the original claims.

Editor's Note. — The references to "Chapter 13" refer to Chapter 13 of Title 11 of the United States Code.

RULE 11

PROCEDURE FOR OBJECTING TO OR CONFIRMING CHAPTER 13 PLANS

I. Confirmation of Plans

(a) It shall be the practice of this Court that following the 341(a) meeting of creditors, if the trustee recommends confirmation, the plan meets the requisite legal criteria, and there were no properly lodged objections to confirmation, an order of confirmation will be tendered to the Judge for consideration without further notice, unless an objection to confirmation is timely filed.

(b) The plan will be confirmed as of the date of filing the order of confirmation; however a supplemental order of confirmation will subsequently be entered which will not substantively change the plan but will set out the various aspects of the plan with more particularity.

II. Objections to Confirmation

(a) An objection to confirmation must be lodged in writing within five (5) days of the adjournment of the 341(b) meeting or it will not be considered by the Court.

(b) All properly lodged objections to confirmation shall be set for hearing by the Court upon proper notice. When a hearing is set on a properly lodged objection, the objecting creditor, the debtor and the debtor's attorney, and the trustee will be noticed.

(c) If an oral objection to confirmation is made at the 341(a) meeting, the objecting party must give in writing his name, address and phone number to the presiding office who will note the objection on the memorandum of the meeting. Within five (5) days the objecting party must then file a formal written objection with the Court or a notice of withdrawal of objection. If neither is done, the objection will be rendered moot, and the case will continue as if no objection has been announced.

III. The objecting party must serve a copy of the written objection on the debtor, the debtor's attorney and the trustee at the time of filing.

Editor's Note. — The "341(a) meeting" and "341(b) meeting" referred to in this rule are the meetings provided for in subsections (a) and (b) of 11 U.S.C. § 341, respectively.

RULE 12

SERVICE ON PARTIES

Any and all filings (except claims) in all proceedings under the Bankruptcy Code must be served on the trustee (including the Chapter 13 Standing Trustee) for the debtor whether or not such Trustee is a party to the proceeding. In Chapter 11 proceedings, the debtor in possession's attorney is to be served in like manner in all proceedings.

Editor's Note. — The references to "Chapter 11" and "Chapter 13" refer to Chapters 11 and 13 of Title 11 of the United States Code, respectively.

RULE 13

INCOME TAX REFUNDS

I. The Internal Revenue Service is authorized and directed to make income tax refunds, in the ordinary course of business, directly to debtors in Chapter 7 and 13 cases unless otherwise ordered by the Bankruptcy Court or otherwise instructed by the Trustee in Chapter 7 cases and the Standing Trustee in the Chapter 13 cases.

II. The Internal Revenue Service is authorized to offset against any refund due a debtor any taxes due the United States Government.

III. The Internal Revenue Service is authorized to assess any tax liability satisfied by offsetting any refunds, when such liability has not previously been assessed.

IV. The Internal Revenue Service is authorized to assess tax liabilities shown on voluntarily filed returns and other agreed-to tax liabilities.

Editor's Note. — The references to "Chapter 7" and "Chapter 13" refer to Chapters 7 and 13 of Title 11 of the United States Code, respectively.

RULE 14

FINAL HEARINGS ON REQUESTS FOR RELIEF FROM STAY

The first scheduled hearing on a request for relief from stay shall be deemed to be the final hearing and all parties are to be prepared for trial at such time unless either party notifies the opposite party and the Court at least 24 hours in advance of the hearing that they wish the hearing treated as a preliminary hearing. Should such occur, at the preliminary hearing, the date for final hearing shall be set.

Court Comment. — This supplements Rule 4001(b).

RULE 15

EXTENT OF AN ATTORNEY'S DUTY TO REPRESENT

Any attorney who files a bankruptcy petition for or on behalf of a debtor shall remain the responsible attorney of record for all purposes including the representation of the debtor in all matters that arise in conjunction with the proceeding until the case is closed or the attorney is relieved upon application and Court order. In the event additional fees are required, they will be applied for in accordance with Rule 2016.

Editor's Note. — Rule 2016, referred to in this rule, is contained in the Bankruptcy Rules adopted by the Supreme Court, which became effective Aug. 1, 1983.

Appendix III. Removal of Causes

(Removal from State Courts to District Courts of the United States. Title 28, U.S. Code, §§ 1441-1451, and Rule 81(c) of Federal Rules of Civil Procedure.)

Chapter 89.

District Courts; Removal of Cases from State Courts.

Sec.

1441. Actions removable generally.
1445. Nonremovable actions.
1446. Procedure for removal.
1451. Definitions.

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown. (June 25, 1948, ch. 646, § 1, 62 Stat. 937; Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898.)

§ 1445. Nonremovable actions.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of Title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; July 25, 1958, Pub. L. 85-554, § 5, 72 Stat. 415; Oct. 17, 1978, Pub. L. 95-473, § 2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub. L. 95-486, § 9(b), 92 Stat. 1634.)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c)(1) A petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the petitioner leave to file the petition at a later time.

(2) A petition for removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the petition shall constitute a waiver of such grounds, and a second petition may be filed only on grounds not existing at the time of the original petition. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied.

(4) The United States district court to which such petition is directed shall examine the petition promptly. If it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal.

(5) If the United States district court does not order the summary dismissal of such petition, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the petition as justice shall require. If the United States district court determines that such petition shall be granted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition for the removal of a civil action and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, § 1, 62 Stat. 939; May 24, 1949, ch. 139, § 83, 63 Stat. 101; September 29, 1965, Pub. L. 89-215, 79 Stat. 887; July 30, 1977, Pub. L. 95-78, § 3, 91 Stat. 321.)

§ 1451. Definitions.

For purposes of this chapter—

(1) The term "State court" includes the Superior Court of the District of Columbia.

(2) The term "State" includes the District of Columbia. (July 29, 1970, Pub. L. 91-358, Title I, § 172(d)(1), 84 Stat. 591.)

Appendix IV. Authentication of Records

(Title 28, U.S. Code, §§ 1738-1741, and Rule 44 of Federal Rules of Civil Procedure.)

Sec.

1738A. Full faith and credit given to child custody determinations.

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term —

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the

child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the Child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination. (Dec. 28, 1980, Pub. L. 96-611, § 8(a), 94 Stat. 3569.)

Appendix V. Extradition

(The following publication, "State of North Carolina Extradition Manual," was published by the North Carolina Courts Center, Institute of Government, the University of North Carolina at Chapel Hill in 1980.)

STATE OF NORTH CAROLINA

EXTRADITION MANUAL

CONTENTS

	Page
EXTRADITION GENERALLY	356
FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE	358
Flow chart of proceedings	360
Crimes subject to extradition	358
Duties of the law enforcement officer	361
Duties of the district attorney	362
Duties of the clerk of court	363
Duties of the agent sent to bring the fugitive back	363
Checklist of documents needed for extradition request	363
When the fugitive is a person who has escaped from custody	365
Extradition of military personnel	366
Agreement Between Governor and District Attorney and the Armed Forces	367
Other special cases	368
FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA	368
Flow chart of proceedings	370
Duties of arresting officer	368
Before an arrest is made	368
If the arrest is to be made without a warrant	369
If a warrant is to be obtained before making the arrest	371
If the fugitive has not yet been charged in the other state	371
Duties of magistrate	372
If the officer comes to you before arresting the fugitive	372
If the officer brings in the fugitive after arresting him without a warrant	372
If the officer arrested the fugitive on the basis of a warrant and is now bringing him before you	373
If the fugitive has been arrested on a Governor's Warrant	374
When the fugitive has not yet been charged with a crime in the other state	374
Duties of the clerk of court	375
When the fugitive is first arrested	375
If the fugitive waives extradition in district court	375
If the fugitive refuses to waive extradition	375
Duties of the district attorney	376
When the fugitive is first arrested	376
When the fugitive appears in district court at the end of 30 days	377
When a Governor's Warrant is issued	377
When the fugitive applies for the writ of habeas corpus	377
If the fugitive is also charged with a crime in North Carolina	378
Duties of the district court judge	378
When the fugitive is first arrested	378
First appearance before a district court judge	378
When the fugitive returns to court after 30 days	379

PAGE
When a Governor's Warrant has been issued 379
If the fugitive wishes to waive extradition 380

Duties of the superior court judge 380
When the fugitive is first arrested 380
When the fugitive applies for a writ of habeas corpus 380
If the fugitive wishes to waive extradition 381

SOME LEGAL ISSUES IN EXTRADITION 382

DETAINERS 384

FORMS 385
Fugitive affidavit 387
Warrant for arrest for fugitive 388
Magistrate's order for fugitive 389
Waiver of extradition 391
Application for requisition (normal) 393
Application for requisition (defendant already convicted) . . . 395
Reimbursement form for agent 397

EXTRADITION GENERALLY

Extradition is the procedure by which a person who has committed a crime in one state (or escaped from prison or violated probation or parole) and fled to another state is returned to the first state. The purpose of this section of the *Extradition Manual* is to give the reader an overview of the extradition process. For those with a limited role, such as the arresting officer or the magistrate, this general description should help them understand how their actions fit in the overall process. More specific instructions for the different stages in the extradition process are given in other sections of the manual.

To begin, consider the case of a person who commits a crime — say, armed robbery — in another state, Ohio, and flees to North Carolina. Probably he has already been formally charged in Ohio, either by indictment or by the issuance of an arrest warrant there. When his presence in North Carolina is discovered, he may be arrested by a North Carolina officer, either with or without an arrest warrant from a North Carolina magistrate.

An arrest without a warrant, which is the less common practice, may be made only if the crime committed in Ohio is punishable there by more than one year's imprisonment. After arresting without a warrant, the officer must take the defendant before a North Carolina magistrate as soon as possible for issuance of a magistrate's order, just as he would do if the person had been arrested for committing a crime in this state. The magistrate determines whether the person has been charged in Ohio with armed robbery, whether armed robbery is punishable by more than a year's imprisonment in Ohio, and whether the person has fled from Ohio. The magistrate is not determining whether there is probable cause to believe the person committed the armed robbery — only whether he has been so charged in Ohio. If the magistrate finds that such is the case, he puts the defendant under bail as he would someone charged with a North Carolina crime, but bail may not be allowed if the crime is punishable by either death or life imprisonment.

More likely, the officer will go to a magistrate to obtain a North Carolina arrest warrant, called a fugitive warrant, before making the arrest. In that case, it is not necessary that the crime be punishable by more than one year's imprisonment; a warrant may be issued if the defendant has been charged with any crime in another state. Once the fugitive warrant is issued, the officer is to make the arrest and take the defendant before the magistrate as soon as possible for setting bail, just as he would for a North Carolina crime.

Usually, the basis for determining that the defendant has been charged with a crime in another state is a National Crime Information Center (NCIC) message on the Police Information Network (PIN) terminal. Such a message by itself is a sufficient basis for the magistrate's finding that the fugitive has been charged in the other state. Although a message is not supposed to appear in the NCIC files unless the warrant is still outstanding and the other state intends to extradite, it is a good practice for the officer to confirm the NCIC report with someone in the other state before making an arrest.

Sometimes the officer's information that a person is a fugitive may come from another source, such as a telephone call, telegram, or letter from an officer in another state. Such information may be used to determine whether the defendant has been charged in the other state. In cases such as these, and in cases in which an NCIC message is used, the other state should be requested to send a copy of the warrant or indictment as soon as possible so that it can be attached to the North Carolina warrant.

Another possibility, though unusual, is that the person has not yet been formally charged in the other state. For example, a person may have robbed a convenience store in Virginia late at night and fled to North Carolina, but no warrant has been issued because no judicial official was on duty in Virginia. The statutes do allow North Carolina officers to arrest fugitives in such cases, but the arrest may be made only after a North Carolina warrant has been issued, and that warrant may be issued only after the magistrate makes the same kind of finding of probable cause he would have to make if it were a North Carolina crime. That is, the magistrate must find probable cause that the defendant committed the crime in Virginia. The most likely basis for that probable cause will be information relayed by Virginia officers through North Carolina officers. Once the warrant is issued, the officer proceeds the same as in the other fugitive cases mentioned above.

It may also be that the fugitive has already been convicted in the other state and has escaped or has fled in violation of the conditions of his probation or parole. In such cases the magistrate simply determines that the fugitive was convicted and fled. The procedures are otherwise the same as for the person who has not yet been tried in the other state.

Once arrested, the fugitive is held until formal extradition procedures can take place. If he wishes to do so, he may waive extradition in front of a clerk of court or a judge and be immediately released to the state from which he fled. Many fugitives choose to do this, knowing that they will be extradited and not wishing to spend the time required for formal extradition. The waiver must be in writing.

If the fugitive does not waive extradition, the next step is for the state from which he fled to formally request the Governor of North Carolina to extradite. The request will come from the governor of the other state, on the basis of information supplied by the prosecutor in the county where the crime was committed. The extradition request to North Carolina includes a copy of the warrant or indictment against the fugitive, plus other papers establishing all the requirements of the formal extradition process. These papers are sent by the Governor's Extradition Secretary to the North Carolina Attorney General's office to determine whether they are legally sufficient to justify extradition through issuance of a Governor's Warrant. The only questions asked by the Governor of North Carolina in deciding whether to extradite are whether the fugitive has actually been charged with a crime in another state and whether the person arrested in North Carolina is the fugitive. The Governor's office does not attempt to determine whether there was probable cause for the charge; that is considered a matter between the other state and the fugitive — just like other defenses he might raise, such as self-defense or alibi.

The fugitive should be notified by the magistrate and district court judge that he may question the legal sufficiency of the paper submitted by the other

state to the Governor's office. That is done by sending a written request to the Governor's office outlining the basis of his challenge. If the Governor determines that the fugitive should be heard on this matter, he will direct that a hearing be held by the Attorney General's office.

If the Governor's office is satisfied, either with or without a hearing, that the requirements of extradition have been met by the other state, the Governor issues what is known as a Governor's Warrant. This paper authorizes the fugitive to be taken into custody — in fact, he may already be in custody if he was not allowed bail or could not make bail — to be turned over to an agent of the other state. Before being turned over, the fugitive is to be taken before a judge to be informed that he has the right to challenge the legality of his arrest through habeas corpus proceedings and to have counsel appointed for that purpose if he cannot afford a lawyer. The habeas corpus proceeding is held in North Carolina; the only grounds for challenging the arrest under the Governor's Warrant are that: (1) the person has not been charged with a crime in the other state, or (2) he is not the person being sought. If the fugitive chooses not to try to obtain a writ of habeas corpus, or if he tries and fails, he is turned over to the agents from the other state.

If a person who commits a crime in North Carolina flees to another state and is found there, essentially the same procedure takes place. A North Carolina fugitive may be extradited from another state if he committed any crime in this state, a felony or misdemeanor, but the State of North Carolina will pay the expenses of extradition only if the crime is a felony. The county would have to pay for a misdemeanor, and some other states are reluctant to extradite for minor crimes.

Once the fugitive is arrested in the other state, the North Carolina district attorney is notified and must put together the documents required by the North Carolina Governor's office for requesting extradition (assuming that the fugitive does not waive extradition). These documents include copies of the arrest warrant or indictment, a statement that the extradition is not sought to enforce a private claim, certain additional information about the circumstances of the crime, and certifications that the documents are all true copies. The Governor's Extradition Secretary reviews the materials to be sure they comply with the requirements of the other state and then makes a formal request for extradition from that state. Once extradition is granted, the Governor commissions one or more North Carolina officers named by the district attorney to bring back the fugitive.

The procedures for extradition are essentially the same in all the states. All except a few states have passed the Uniform Criminal Extradition Act, which is the law in North Carolina, and the others have statutes similar to the uniform act. There are some differences, however, in the practice in other states. For example, many states will not extradite for misdemeanors. The North Carolina Governor's office has experience with the peculiar requirements of other states and tries to review all documents to be certain they will satisfy the other state.

FUGITIVE FROM NORTH CAROLINA FOUND IN ANOTHER STATE

CRIMES SUBJECT TO EXTRADITION

Any person who is charged with a crime in North Carolina and flees to another state may be extradited to North Carolina to stand trial. (Also subject to extradition are those persons who have been *convicted* in North Carolina and have escaped or broken the conditions of probation or parole). However, G.S. 15A-744 provides that the State of North Carolina shall pay the expenses

of extraditing only someone who has been charged with a felony. Thus a fugitive charged with a misdemeanor may be extradited but the costs of that procedure — the greatest expense is sending an agent to bring the fugitive back — must be paid by the county where the crime was committed. For that reason extradition should never be initiated against someone charged with a misdemeanor unless there is some assurance the county commissioners will pay the costs.

The National Association of Extradition Officials recommends the policies set out below on extradition for certain offenses. The law allows extradition for each of the offenses mentioned, but the Governor's office agrees with the recommended policies and expects all law enforcement officers and district attorneys to follow them.

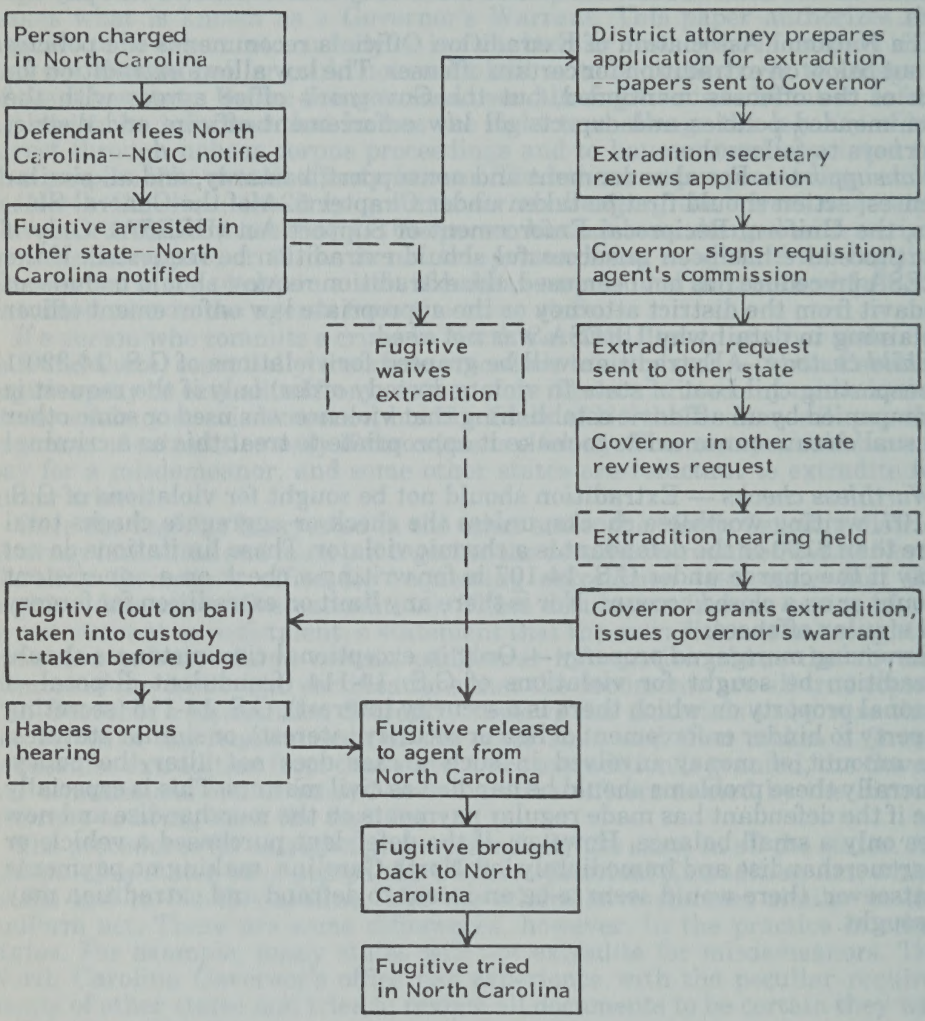
Nonsupport — For abandonment and nonsupport, bastardy, and all similar offenses, action should first be taken under Chapter 52A of the General Statutes, the Uniform Reciprocal Enforcement of Support Act (URESA). Only if that procedure has been unsuccessful should extradition be requested. If the URESA procedure has not been used, the extradition request should include an affidavit from the district attorney or the appropriate law enforcement officer explaining in detail why URESA was not used.

Child custody — Extradition will be granted for violations of G.S. 14-320.1 (transporting child out of state to violate custody order) only if the request is accompanied by an affidavit establishing that violence was used or some other unusual circumstance exists to make it appropriate to treat this as a criminal case.

Worthless checks — Extradition should not be sought for violations of G.S. 14-107, writing worthless checks, unless the check or aggregate checks total more than $100 or the defendant is a chronic violator. These limitations do *not* apply if the charge under G.S. 14-107 is for writing a check on a nonexistent account or on a closed account. Nor is there any limit on extradition for forgery and similar offenses.

Removing mortgaged property — Only in exceptional circumstances should extradition be sought for violations of G.S. 14-114 (fraudulent disposal of personal property on which there is a security interest), G.S. 14-115 (secreting property to hinder enforcement of lien or security interest), or similar statutes. The amount of money involved in such a case does not alter the policy. Generally these problems should be handled as civil matters. This is especially true if the defendant has made regular payments on the merchandise and now owes only a small balance. However, if the defendant purchased a vehicle or other merchandise and immediately left North Carolina, making no payments whatsoever, there would seem to be an intent to defraud and extradition may be sought.

WHAT HAPPENS WHEN A FUGITIVE FROM NORTH CAROLINA IS FOUND IN ANOTHER STATE



Rental property — If a person fails to return rented property, such as an automobile, and the car has been located, there would appear to be no intent to steal and this matter should be handled civilly rather than through extradition. If, however, the property is rented and the person immediately leaves North Carolina for parts unknown, larceny is probably the proper charge and extradition would be appropriate. Generally, extradition should be sought if the facts show an intent to deprive the owner of the property permanently and thus support a charge of larceny, but extradition should not be sought if the facts support only a charge such as G.S. 14-72.2, unauthorized use of conveyance (unless the conveyance is an aircraft, in which case the offense is a felony).

DUTIES OF THE LAW ENFORCEMENT OFFICER

A. *Review the evidence in the case.* When notified that the fugitive has been taken into custody in the other state and refuses to waive extradition, the first thing the officer should do is review the evidence in the case to be certain that extradition is appropriate and that a prosecution might be successful. Review the section of this manual entitled CRIMES SUBJECT TO EXTRADITION. If the crime is appropriate for extradition, consider whether the witnesses need to be interviewed again. Determine whether the witnesses are likely to change their testimony, whether any of them has already received restitution, whether they are willing to testify in court, and whether they can identify the fugitive by photograph or other means. If witnesses or officers have submitted any affidavits in the case, review these and determine whether they support or contradict the other information in the case. Also review all investigative reports.

B. *Obtain a warrant if necessary.* If, for some reason, the fugitive has not yet been charged in an arrest warrant or an indictment, go to a magistrate and state the facts in the case so that an arrest warrant may be issued (unless you know that the district attorney would prefer to submit a bill of indictment). Five copies of the warrant will be needed eventually, so have five copies issued by the magistrate, each one signed separately. If a warrant or indictment has already been issued, which should usually be the case, have a copy available for reference when you talk with the district attorney. If the charging document is a warrant rather than an indictment, it will be necessary also to have an affidavit by the investigating officer or victim stating the basis for issuing the warrant. This affidavit must be sworn to in front of a magistrate or judge and should have the same date as the warrant or an earlier date.

C. *Check the fugitive's record.* Make a check of the fugitive's prior record and have a copy of it with you when you go to talk with the district attorney.

D. *Meet with the district attorney.* Bring to this meeting with the district attorney or assistant district attorney all the information and documents discussed above. Be candid about any problems you foresee with witnesses or with the methods of investigation in the case and any other factor that might affect the outcome of the case. At this meeting the district attorney should decide whether to proceed with extradition. Usually an assistant district attorney will then take responsibility for preparing the proper papers, but he may well ask your assistance. If he does ask for your help, review the section of this manual entitled CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST.

DUTIES OF THE DISTRICT ATTORNEY

A. *Decide whether extradition should be sought.* After a law enforcement officer has been notified that a fugitive from North Carolina is in custody in another state and refuses to waive extradition, he should come to you with the relevant information (see the section of this manual on DUTIES OF THE LAW ENFORCEMENT OFFICER). You must decide whether extradition should be sought. First, review the section of this manual entitled CRIMES SUBJECT TO EXTRADITION. If you are satisfied that extradition is appropriate for the kind of offense with which the fugitive has been charged, next consider the following factors:

— The seriousness of the offense.
— The evidence available to prove the crime.
— The challenges that might be mounted against the evidence or the methods of investigation.
— The character of the defendant, including prior convictions.
— The probability of the defendant's committing similar crimes in other communities.
— The probable length of time the defendant will be imprisoned if he is returned to North Carolina and convicted, and the effect of that imprisonment on his conduct after he is released.
— The probability that the governor of the other state will grant extradition.
— The cost of having the defendant returned to North Carolina.
— The effect of not extraditing on others in the community who might consider committing similar crimes.

B. *Prepare the proper papers for extradition.* A separate section of this manual lists the documents that must be submitted to the Extradition Secretary in the Governor's office. An assistant district attorney or administrative assistant may prepare those documents, and a law enforcement officer may assist. The application for requisition may be signed by the district attorney or an assistant. If for some reason the fugitive has not yet been charged in North Carolina in an arrest warrant or indictment, the first step to take is to have such process issued. Although an arrest warrant is sufficient, usually the proceedings in the other state go faster if an indictment is used. For that reason an indictment should be sought unless it is too inconvenient to do so at the time. If an arrest warrant is used, it must be accompanied by an affidavit stating the grounds for charging the defendant. (Although some states consider the standard North Carolina arrest warrant alleging the elements of the offense and the date it was committed to be a sufficient affidavit by itself, most states require something more — something similar to the affidavit used to establish probable cause for a search warrant. To avoid delays, such an affidavit should be included whenever the charging document is a warrant rather than an indictment.) Almost always the affidavit will be completed by the investigating officer or victim. To avoid any question in the other state, the affidavit should have the same date as the warrant or an earlier date.

C. *Select the agents to go to the other state.* The application for requisition is to include the names of the agents to go to the other state to bring back the fugitive. The district attorney should attempt to have the investigating officers or other officers familiar with the case named as agents. It is permissible to name an individual as an agent and include the option of that person's naming someone else, such as "Sheriff Fred Taylor of Ashe County and/or his agent." Some individual's name must always be included. Agents are expected to be ready at any time to travel to the other state when extradition has been granted by the other state or when a hearing is to be held there. The state does not pay travel expenses for a hearing unless the fugitive is returned on that trip.

DUTIES OF THE CLERK OF COURT

The clerk of court has only a limited role in bringing a fugitive back to North Carolina. When the district attorney makes his request for extradition to the Governor of North Carolina (who will in turn make the same request to the governor of the state where the fugitive is now located), the district attorney will have to include various documents, including a copy of the arrest warrant or indictment. Each document must be certified by the official who issued it or by the keeper of the original, the clerk of court. Also, the clerk must certify that the various other officials who certify the documents — the district attorney, magistrate, or judge — are indeed the officials they claim to be. In turn, a judge must certify that the clerk is indeed that official. A summary of the documents and certifications needed for the extradition request is included in the section of this manual entitled CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST. Otherwise, the clerk has no duties in connection with extradition of a North Carolina fugitive from another state.

DUTIES OF THE AGENT SENT TO BRING THE FUGITIVE BACK

When the district attorney applies to the Governor of North Carolina to seek the extradition of a fugitive who is in another state, he will name the law enforcement officers to be designated the Governor's agents for bringing the fugitive back. An officer who has been designated an agent should not go to the other state until he has been notified that the governor of that state has approved extradition and the authorities there are ready to hand over the fugitive. Also, when more than one agent is to make the trip, the North Carolina Extradition Secretary should be notified before they leave. Expenses will not be paid for any trip made before that notification (a possible exception, though, is when the officer has to attend a hearing before extradition is ordered).

Your commission as an agent of the Governor of North Carolina will be sent to the other state with the Governor's request for extradition and will be waiting for you there. When you return the fugitive to North Carolina to the sheriff of the county where he is to be tried, the sheriff should complete the part of the commission form indicating that he has received the prisoner. You must complete the return portion of the commission and submit it to the Governor's office. If for some reason the fugitive could not be brought back, that fact must be stated on the return portion of the commission and an explanation given.

If the fugitive decided to waive extradition, the officer who brought the fugitive back must send a copy of that waiver to the Governor's office.

In the back of this manual is a copy of the form used for reimbursement of expenses.

CHECKLIST OF DOCUMENTS NEEDED FOR EXTRADITION REQUEST

Listed below are all the documents that might be needed when a request for extradition is sent to the Governor's Extradition Secretary. Usually an assistant district attorney is responsible for gathering the documents, though in some districts he may have substantial assistance from an administrative assistant, law enforcement officer, or someone else. The list states when a document must be certified or signed by a particular person. Whoever gathers the documents should collect *five* complete sets, *four* to go to the Extradition Secretary and *one* to be retained in the district attorney's files.

Arrest warrant — Copies of the arrest warrant are needed if the fugitive has not yet been indicted. If he has been indicted, the arrest warrant is not needed;

copies of the indictment will be used instead. The warrant or indictment should be reviewed to see that it properly charges the offense and cites the statute violated. Use of an indictment simplifies the process. An order for arrest (capias) is *not* sufficient by itself.

Affidavits supporting warrant — When the charging document is an arrest warrant, it must be supported by an affidavit. The most likely person to write the affidavit will be the investigating officer or victim. The affidavit must state enough facts to establish probable cause for the issuance of the warrant and, to avoid questions in the other state of the authority of the official to issue the warrant, it must be sworn to in front of a magistrate or judge rather than a clerk. To show that the affidavit was the basis for issuing the warrant, it must have the same date as the warrant or an earlier date. An affidavit is clearly not necessary when the charging document is an indictment, though a few other states prefer to have an affidavit then also.

Certification of documents — If a warrant and affidavit are submitted, they must be accompanied by a certification of the magistrate or judge who issued the warrant or took the affidavit. A clerk of court may certify copies of documents when the clerk is the keeper of the original. Each copy must be certified.

Certifications of office — Whenever a judge or magistrate certifies a document, the clerk of court must certify that person's official character. Then a district court or superior court judge must certify the official character of the clerk. And in turn the clerk must certify the official character of the judge who has certified the clerk.

The indictment — If the fugutive has been indicted, that document should be submitted instead of an arrest warrant. The district attorney should review the indictment to be certain it properly charges the offense and that it has been signed by the foreman. He should also check to see that it cites the statute violated. The authenticity of each copy must be certified by the clerk of court, and the official character of the clerk certified by the judge and the official character of the judge certified by the clerk.

Application for requisition — This form, included in the back of this manual, must be completed in full. Note that the form includes the following information:

— The full name of the fugitive, properly spelled.
— A statement that in the district attorney's opinion the ends of public justice require that the fugitive be brought to North Carolina for trial.
— A statement that the district attorney believes that he has sufficient information to convict the fugitive.
— The names and addresses of the agents who are to go to the other state and bring the fugitive back to North Carolina and a statement that the persons recommended as agents are proper persons and have no private interest in the arrest or conviction of the fugitive.
— A statement whether there has been any former application for requisition of the same person for the same transaction, including the date of such request, and a statement of the reason for the present request if there has been a prior one.
— If the fugitive is under arrest in the other state, a statement that he is under arrest, the nature of the proceedings, the place (with complete address) where he is in custody, if known. If the fugitive is out on bail, the date of his hearing should be stated. If the fugitive's home or business address is known, that should also be stated. The source of this information should be given.
— A statement that the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatsoever, and that if the requisition is granted, the criminal proceeding will not be used for any such purposes.

— A statement of the crime charged and the approximate time, date, places, and circumstances of its occurrence. This statement should include a citation to the statute violated.
— A statement that the person was in North Carolina at the time the crime was committed and has since fled. If, instead, while in another state the person committed an act that intentionally resulted in the crime in North Carolina, that fact must be stated.
— If the crime did not occur recently, an explanation for the delay in making application.

The requisition form provides blanks for all this information or notes the need to include the information.

Certification of district attorney — Again, the clerk must certify the official character of the district attorney submitting the application, and in turn the clerk must be certified by a judge who must then be certified by the clerk. Note that one such certification of official character per official is all that is required, no matter how many documents that official may have signed.

Special affidavits — In any case involving fraud, false pretense, embezzlement, or forgery, there must also be an affidavit of the principal complaining witness or informer that the application is made in good faith, for the sole purpose of criminal punishment, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt or for any other private purpose, either directly or indirectly. If such an affidavit is not included, a good explanation for its absence must be given.

Photograph of the fugitive — Although a photograph is not required, it can be of substantial assistance in identification and should be included whenever possible. The photograph should be accompanied by an affidavit to the effect that the person shown is the person charged with the crime.

Fingerprints of the fugitive — Fingerprints are not required either, but it is highly desirable that they be provided for identification when available.

The statute — Copies of the statute the fugitive is charged with violating should be included.

WHEN THE FUGITIVE IS A PERSON WHO HAS ESCAPED FROM CUSTODY

Extradition procedures are slightly different when the fugitive from North Carolina is a person who has already been convicted in this state and has escaped from custody or has left the state in violation of parole or probation conditions. A separate form, included at the back of this manual, is used for requisition in these cases. The application is to be made by the district attorney or the sheriff if the person was in jail awaiting transfer to the Department of Correction or if he was out of jail pending appeal. If the person escaped from the custody of the Department of Correction, the application is to be made by the Secretary of Correction or a properly designated official of the Department. For a fugitive who has left the state in violation of conditions of probation, the application may be made by the district attorney of the district where the person was serving probation (or might be prepared for the district attorney's signature by the Division of Probation and Parole). If the person was on parole, the request may be made by the district attorney or the Parole Commission. The application for requisition is to be accompanied by the following documents:

— The indictment (or the arrest warrant, if the person was tried on a warrant).
— The judgment of conviction and sentence upon which the person was being held at the time of escape.

— An affidavit of the officer from whose custody the person escaped, showing that an escape occurred and the circumstances of it.
— The record of escape, which includes the transcript and fingerprints.

Five copies of each document should be prepared, with *four* to be sent to the Governor's Extradition Secretary and *one* to be retained by the official who made the application. The clerk of court who holds the original must certify to the authenticity of the indictment (or warrant) and the judgment of conviction and sentence. The clerk must also certify the official character of the person who made the affidavit of the fugitive's escape. The official character of the clerk must be certified by a judge and in turn the official character of the judge must be certified by the clerk.

EXTRADITION OF MILITARY PERSONNEL

If an application for requisition is made for someone who is on active duty with the Air Force, Army, Marine Corps, or Navy, the application must be accompanied by an agreement by the appropriate authorities that:

— The officer in charge of the fugitive will be informed of the outcome of any trial; and
— If the military authorities desire his return, the fugitive will, upon acquittal or completion of his sentence, be returned to the military authorities at the place where he was taken into custody or given transportation to the nearest receiving ship, station, or barracks at the expense of the authority seeking requisition.

If the crime is a felony and the requisition is made through the Governor's office, this agreement will be prepared by the Governor's office and the State will pay the expenses. If the crime is a misdemeanor, so that the expenses of extradition are to be borne by the county, then the district attorney or other official making the application for requisition must prepare and execute the agreement. The agreement may be in the form of a letter to the Secretary of the appropriate branch of the service, setting out the required promises. An example of such an agreement is shown on page 367.

AGREEMENT BETWEEN GOVERNOR OR DISTRICT ATTORNEY
AND THE ARMED FORCES

_____
date

TO WHOM IT MAY CONCERN:

In consideration of the delivery of _____
(name of fugitive, grade, service number, and branch

_____ to _____ at _____, for trial
of armed forces) *(county)* *(city and state)*

upon the charge of _____
(list charge or charges)

_____,

I hereby agree, pursuant to the authority vested in me as _____
(Governor or District)

_____, that the commanding officer in charge of the _____
Attorney) *(branch of service,*

_____,
location of base or station, city and state)

and the Secretary of the _____ will be informed of the
(branch of service)

outcome of the trial and that said _____ will be returned to
(name of fugitive)

the _____ authorities at the place of delivery named above or
(name of branch of service)

to such other place as may be designated by the _____
(name of branch of service)

or issued transportation to the nearest receiving _____
(ship, station, or base)

without expense to the United States or to the person delivered, immediately upon the completion of the trial if the person is acquitted or immediately upon satisfying the sentence of the court if he is convicted and a sentence imposed, or upon other disposi

of his case, provided that the _____ authorities shall then desire his return.
(name of branch of service)

_____
(signature and typed name of Governor or District Attorney)

OTHER SPECIAL CASES

Fugitives out of the United States — In cases of international extradition the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Secretary of State in Washington.

Fugitives in United States possessions — If the fugitive is in a United States territorial possession, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it directly to the governor of the possession.

Fugitives in the District of Columbia — If the fugitive is in the District of Columbia, the district attorney completes the same papers and sends his application to the Governor's Extradition Secretary. The Governor's office will process the request, add its endorsement, and send it to the Chief Judge of the Superior Court of the District of Columbia. The District of Columbia has several special requirements for extradition; one is that identification of the fugitive must be made by photograph or other description or by sending a witness who can identify the fugitive.

Renewal of application — When an application must be renewed — for example, where the fugitive could not be found in the state from which requisition was first sought — new or recertified copies of the papers required for extradition must be furnished.

FUGITIVE FROM ANOTHER STATE FOUND IN NORTH CAROLINA

DUTIES OF ARRESTING OFFICER

Before an Arrest is Made

A. *Determine whether the person is a fugitive.* The first thing the officer needs to know is whether the suspect has been charged with a crime in another state (by warrant or indictment) or has escaped from imprisonment there (following a conviction) or violated probation or parole by leaving that state. Most often an officer determines that someone is a fugitive by receiving an NCIC message on the PIN terminal. Less often the officer may receive the information by telephone or letter or telegram from an officer in the other state. The PIN message by itself is sufficient to obtain a North Carolina arrest warrant for the fugitive, but the information should be verified by phone or otherwise if possible. As mentioned below, a copy of the other state's warrant or indictment should be obtained as soon as possible and attached to the North Carolina warrant.

B. *Determine whether to arrest with or without a North Carolina warrant.* If the fugitive has been formally charged with a crime in the other state *and* the crime is punishable in that state by death or imprisonment for more than one year, you may arrest him without a North Carolina warrant. Otherwise, an arrest may not be made until a North Carolina magistrate has issued a warrant. It is always preferable to obtain a warrant first if there is time.

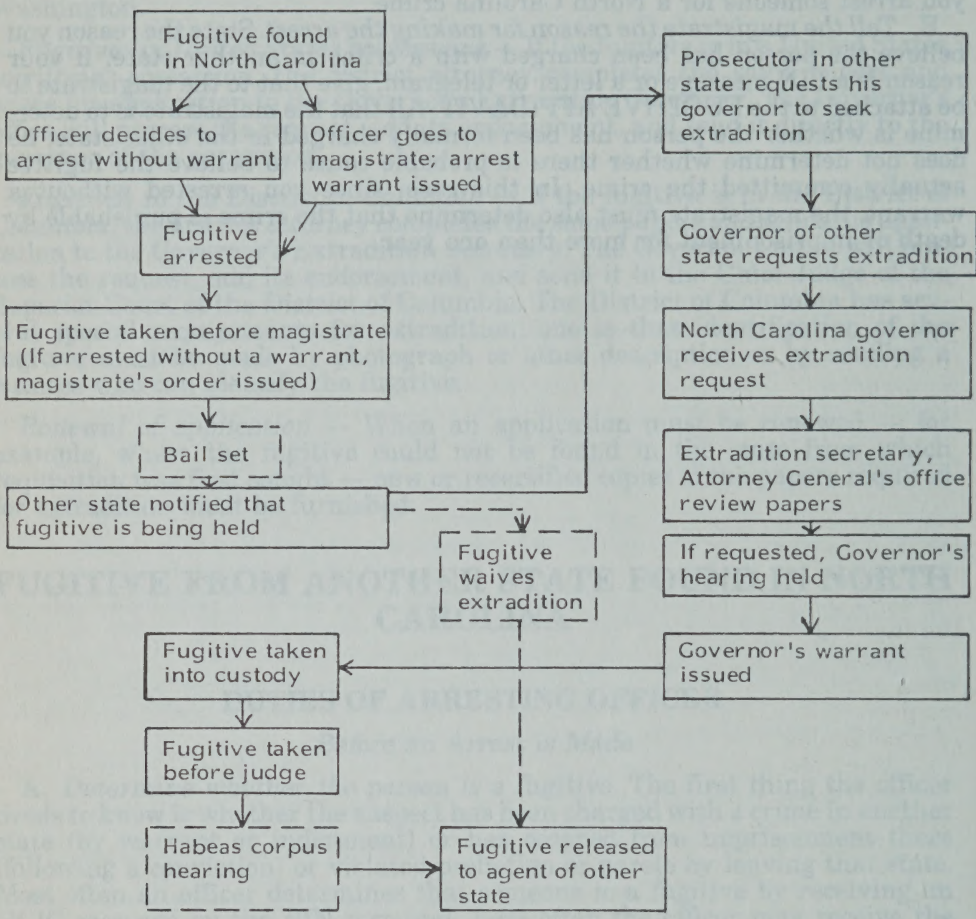
If the Arrest Is to Be Made Without a Warrant, Follow These Steps

C. *Arrest the fugitive.* Follow the same procedure you use when arresting someone for a North Carolina crime. Inform the fugitive why he has been arrested.

D. *Take the fugitive to a magistrate.* This requirement is the same as when you arrest someone for a North Carolina crime.

E. *Tell the magistrate the reason for making the arrest.* State the reason you believe the person has been charged with a crime in another state. If your reason is a PIN message or a letter or telegram, give that to the magistrate to be attached to the FUGITIVE AFFIDAVIT. All that the magistrate is to determine is whether the person has been formally charged in the other state; he does not determine whether there is probable cause to believe the fugitive actually committed the crime. In this case, since you arrested without a warrant, the magistrate must also determine that the crime is punishable by death or imprisonment for more than one year.

WHAT HAPPENS WHEN A FUGITIVE FROM ANOTHER STATE IS FOUND IN NORTH CAROLINA



F. *Take the fugitive to jail or release on bail as ordered by the magistrate.* Unless the crime is punishable by death or life imprisonment, the magistrate may release the fugitive on bail just as if he was charged with a North Carolina crime.

G. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, request your contact in the other state to send a copy of the arrest warrant or indictment charging the fugitive with the crime there. When this is obtained, it should be attached to the Magistrate's Order.

If a Warrant Is to Be Obtained Before Making the Arrest, Follow These Steps Instead

C. *Go to the magistrate and complete an affidavit for an arrest warrant.* The FUGITIVE AFFIDAVIT contains instructions on what information is needed. Either you or the magistrate may fill out the form, but you must be certain it accurately reflects your information and you must sign as the affiant.

D. *Tell the magistrate your reasons for arresting the fugitive.* If you have a PIN message, letter, telegram, or other written document showing that the fugitive has been charged with a crime in another state or has escaped from imprisonment there, show that document to the magistrate and help complete the affidavit. All that the magistrate is to determine is whether the fugitive has been charged with a crime in the other state or whether he has escaped from imprisonment or violated probation or parole. The magistrate is not trying to determine whether there was probable cause for the other state to make the charge. In this case it is not necessary to show what punishment the other state places on the crime.

E. *Once the warrant is issued, arrest the fugitive.* The warrant is executed the same as if the person were charged with a North Carolina crime. Inform the fugitive of the reason for his arrest.

F. *Take the fugitive to a magistrate.* This is the same procedure you use when arresting someone with a warrant for a North Carolina crime. The magistrate is to decide whether to allow bail, except when the crime is punishable by death or life imprisonment.

G. *Take the fugitive to jail or release on bail as ordered by the magistrate.* The procedure is the same as when you arrest someone for a North Carolina crime.

H. *Request a copy of the warrant or indictment from the other state.* If this has not already been done, request your contact in the other state to send a copy of the arrest warrant or indictment charging the fugitive with the crime there. When this is obtained, it should be attached to the arrest warrant issued in North Carolina.

If the Fugitive Has Not Yet Been Charged in the Other State

The extradition statutes also allow you to arrest someone who has committed a crime in another state even if he has not been formally charged there. This should occur very infrequently. Most likely it will happen when someone commits a crime in a neighboring state and immediately flees to North Carolina and you are contacted before a judicial official has been found in that other state to issue the warrant. Before making the arrest you need to go to a magistrate and obtain a warrant for arrest. You may use a standard North Carolina arrest warrant form for this purpose, modifying it to allege the name of the crime in the other state (without giving all the elements) and to allege the statute of the other state. Because the other state has not yet issued a warrant, you must show the magistrate *probable cause* to believe the fugitive

committed the crime in the other state, just as if you were asking to have a warrant issued for a crime committed in North Carolina. Your probable cause will be the information you have received from the officers in the other state linking the person with the crime there. Once the arrest warrant is issued, proceed just as if it were a warrant charging a North Carolina crime. You should request the officers from the other state to send a copy of the warrant issued there when the defendant is charged in that state. When you receive it, that copy should be attached to the North Carolina arrest warrant.

DUTIES OF MAGISTRATE

If the Officer Comes to You Before Arresting the Fugitive

A. *Determine whether there are grounds for an arrest.* Place the officer under oath and ask what his reasons are for making an arrest. The three grounds that justify an arrest are: (1) the person has been charged with a crime in another state and has fled; (2) the person has been convicted of a crime in another state and has escaped from imprisonment there; or (3) the person has been convicted of a crime in another state and has violated the conditions of his probation or parole by fleeing. The officer's information must be reliable; usually it will consist of a PIN message, but sometimes it may be a letter or telegram or phone call from an officer in the other state, or even a copy of the warrant or indictment from the other state. You are *not* to determine whether there is probable cause to believe the person committed the crime — only whether he has been charged in the other state or has escaped. You must also determine that this is the person wanted by the other state.

B. *Complete the affidavit and arrest warrant.* It is necessary to complete both the FUGITIVE AFFIDAVIT and the WARRANT FOR ARREST FOR FUGITIVE and be certain that they are attached. Follow the usual procedure on number of copies to be completed, sending the original to the clerk's office. Attach to the original the PIN message or any other document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the arrest warrant or indictment in the other state as soon as possible and have it attached to the original copy of the warrant in the clerk's office.

If the Officer Brings in the Fugitive After Arresting Him Without a Warrant

A. *Determine whether the officer had adequate grounds for the arrest.* Place the officer under oath and ask him his reasons for making the arrest. An officer may make an arrest without a warrant only when the person has been charged with a crime in another state *and* that crime is punishable by death or by imprisonment for more than one year. The person might have been charged in the other state by the issuance of an arrest warrant there, by an indictment, or by information filed by a prosecutor in that state. All you are to determine is whether the person has been charged in the other state, *not* whether there was probable cause for the charge. The officer's information that the person has been charged must be reliable; usually it will be a PIN message, but sometimes it may be a letter or telegram or telephone call from an officer in the other state. Sometimes the officer may even have a copy of the warrant or indictment from the other state. If the officer's information is a PIN message, ask him whether he has phoned the other state to verify that the charge is still outstanding and they wish to extradite. It is not essential that the officer make this verification — the PIN message is sufficient justification for arresting the fugitive — but it is a highly recommended practice. Of course you must also determine that the person arrested is the person charged in the other state.

B. *Complete a magistrate's order.* Complete the FUGITIVE AFFIDAVIT and the MAGISTRATE'S ORDER FOR FUGITIVE. Follow the usual procedure on the number of copies to be completed, with the original going to the clerk's office. Attach to the original the PIN message or other written document used to establish that the person is a fugitive. Remind the officer to obtain a copy of the other state's warrant or indictment as soon as possible and have it attached to the original copy of the magistrate's order in the clerk's office.

C. *Inform the fugitive of the charges.* Follow the same procedure you follow in any other case, informing the person of the charge against him, his right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights on the reverse side of the magistrate's order form. You need not read all that information on the form to him, but at least tell him that he may write the Governor's office to request a hearing before the Governor grants extradition. The request must be in writing and must state the person's reasons for challenging his extradition.

D. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is a bail bond with sureties. The bail bond schedule given the magistrate by the senior resident superior court judge should include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime and sometimes that amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail.

E. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, this procedure will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. In many cases a fugitive will waive formal extradition once he is told about the process and has had an opportunity to talk to a lawyer. If the chief district judge for your district would prefer not to deal with the fugitive at this point, your release is on the condition that the fugitive return for a district court appearance at a specific time within 30 days or that he surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

If the Officer Arrested the Fugitive on the Basis of a Warrant and Is Now Bringing Him Before You

A. *Inform the fugitive of the charges against him.* The procedure is the same as if the person were charged with a North Carolina crime; he should be informed of the charge against him, the right to communicate with counsel and friends, and whether he is entitled to bail. Also point out to him the information about his rights on the reverse side of the arrest warrant form. You need not read all the information on the form to the fugitive, but be sure to tell him that he may request a hearing before the Governor grants extradition. The request to the Governor's office must be in writing and must state the reasons for challenging his extradition.

B. *Determine whether to allow bail.* G.S. 15A-736 allows a fugitive to be given bail unless the offense with which he is charged in the other state is punishable by death or life imprisonment. Apparently the only form of pretrial release that may be used is bail bond with sureties. The bail bond schedule

given the magistrate by the senior resident superior court judge should include instructions on what bond to set for fugitives. Sometimes the same amount is required as for a similar North Carolina crime and sometimes the amount is doubled or otherwise multiplied. If bail is not allowed, or if the defendant cannot meet the bail, he should be committed to the county jail.

C. *Order the fugitive to appear in district court.* Whether the fugitive is released on bond or cannot make bond or is ineligible, the release or commitment order should direct that he appear before a district court judge at the earliest possible time. Although the statute does not require an immediate district court appearance for the fugitive who is released on bond, this procedure will give the district judge an early opportunity to review the fugitive's bond, explain the extradition process, and appoint counsel if necessary. In many cases a fugitive will waive formal extradition once he is told about the process and has had an opportunity to talk to a lawyer. If the chief district judge for your district would prefer not to deal with the fugitive at this point, your release is on the condition that the fugitive return for a district court appearance at a specific time within 30 days or that he surrender when a Governor's Warrant is issued. If the Governor's Warrant has not been issued by the time of that first district court appearance, the district judge can continue the case for additional 30-day periods.

If the Fugitive Has Been Arrested on a Governor's Warrant

A. *Inform the fugitive of the charges against him.* Inform the fugitive of what crime he has been charged with in the other state (which he was already told when he was first arrested in North Carolina) and that the Governor of North Carolina has issued a warrant for him to be taken into custody and returned to the state from which he fled. Also inform the fugitive of his right to communicate with counsel and friends. Usually bail is not given at this stage, but it may be granted if there is a strong likelihood that the defendant will return. Before releasing a fugitive on bail at this point, the magistrate should check with a judge.

B. *Commit the fugitive to jail.* Commit the fugitive to jail to await his appearance before a district court judge, unless he has been released on bail.

C. *Order the fugitive returned to district court at the earliest possible date.* The order of commitment or release order should specify the time and date that the fugitive is to be returned to appear before a district court judge. That should be the earliest time possible. At that time he will be informed of his right to apply for habeas corpus.

When the Fugitive Has Not Yet Been Charged with a Crime in the Other State

The extradition statutes also allow a fugitive to be arrested in North Carolina even though he has not yet been formally charged in the other state. This should occur rarely. Most likely it will happen when the person commits a crime in a neighboring state and flees to North Carolina immediately; then law enforcement officers in North Carolina are requested to arrest him before officers in the other state have been able to find a judicial official to issue an arrest warrant there. Before a North Carolina official can make an arrest in this situation, he must obtain an arrest warrant. The procedure you follow in issuing such a warrant is the same as when the officer wants to charge someone with a North Carolina crime. That is, the officer must be placed under oath and must state facts from which you can independently determine that there is probable cause to believe the person committed the crime in another state. You

cannot just accept the word of the officers from the other state that the person committed the crime; you must be told the reasons for reaching that conclusion. (This is different from any other situation involving a fugitive in which all you need to establish is that the person has been charged in the other state, and you are not allowed to inquire as to the probable cause for that charge.) If you determine that there is probable cause, complete an arrest warrant. You can use the standard arrest warrant form but will need to modify it to indicate that the crime is one committed against the law of another state. Instead of spelling out the elements of the offense, you will be able only to state the name of the crime in the other state. Use the name of the crime given by the officers from that state, which may be different from the name used in North Carolina (for example, "second degree robbery"). After the warrant is issued, the case proceeds like any other involving a fugitive.

DUTIES OF THE CLERK OF COURT

When the Fugitive Is First Arrested

A. *Assign a docket number and set a district court hearing.* When the fugitive is arrested, he will be taken to a magistrate like anyone else arrested in North Carolina and will either be committed to jail or given pretrial release. In either case, the magistrate should have scheduled the person to appear in district court as soon as possible. (Although a fugitive released on bail need not be immediately scheduled for a district court appearance — he could simply be released on bond on the condition that he return at the end of 30 days or whenever a Governor's Warrant is issued — it is recommended to the magistrate that the fugitive be set for a district court appearance at the next session. An early appearance gives the judge an opportunity to explain the extradition process and to determine whether the fugitive needs an attorney, which may well result in an early waiver of the formal extradition procedures.) When the fugitive papers are received from the magistrate, the clerk should assign a docket number and set the case for the *first possible district court session.*

If the Fugitive Waives Extradition in District Court, Take These Steps

B. *Accept the waiver and see that the file is complete.* While he is in district court, the fugitive may decide to waive extradition. Either the judge or clerk may take that waiver (not a magistrate); a form is provided in this manual. Whoever accepts the waiver should explain the fugitive's rights to him. The clerk is responsible for seeing that the papers are handled correctly. One copy of the waiver goes in the case file, one copy must be sent to the Governor's office, and one copy goes to the jail with the fugitive (to be given to the officer from the other state when he takes custody). Generally the clerk is to see that copies of all correspondence involving the fugitive are kept in the case file. The sheriff is responsible for notifying the officers in the other state that the fugitive is ready to be returned.

If the Fugitive Refuses to Waive Extradition These Steps Should be Followed Instead

B. *Assign an attorney and set a new court date.* If the fugitive does not waive extradition during his first appearance in district court, the clerk should determine indigency and assign an attorney to represent him. Although the statutes do not require appointment of counsel until later in the process, matters can

be expedited if the fugitive has a lawyer. The attorney should be mailed a copy of the appointment, the refusal form, the warrant, and a notice of the next court date. Most likely, after the first appearance in district court the judge will have continued the case for 30 days. The defendant will be ordered to return at that time to see whether a Governor's Warrant has been issued by the Governor of North Carolina to have him returned to the other state. If the Governor's Warrant is issued before then, a fugitive who is out on bail may be taken back into custody and taken immediately before a district court judge. If no Governor's Warrant is issued and the fugitive returns as scheduled in 30 days, the case can be continued and another appearance scheduled later. The statute allows the judge to continue the fugitive's bond or commitment for 60 additional days if the Governor's Warrant has not been issued by the end of the first 30-day period. Usually judges continue the case for two additional 30-day periods rather than one 60-day period. The judge will decide whether the fugitive is to be given bond during this time; the clerk's responsibility is to record the information on the commitment paper or release order. Sometimes the judge will simply release the fugitive after 60 days — not waiting the full 90 days — if the other state has not shown any urgency in carrying out formal extradition. If the judge releases the fugitive because no Governor's Warrant has been issued, the clerk closes the case as a dismissal.

C. *Prepare copies of Governor's Warrant, have defendant served, and set court appearance.* When the Governor's Extradition Secretary issues a Governor's Warrant, the original and one copy are sent to the clerk for the sheriff. The clerk should notify the sheriff that the warrant has been received and should make another copy for the fugitive, giving the Governor's Warrant the same docket number as the fugitive warrant used for the original arrest. In addition to the fugitive's copy, the original Governor's Warrant and one other copy are sent to the jail to be signed by the officers from the other state when they come. If the fugitive is not still in custody, the Governor's Warrant is given to an officer to bring him back into custody. The fugitive should be scheduled for the next session of district court. In district court the judge will tell the fugitive that he may apply for habeas corpus, will see that he gets a lawyer if he does not already have one, and will give him a certain amount of time (though still in custody) to decide whether to apply for habeas. The case is then continued for the period set by the district judge. If the fugitive does not apply for habeas corpus by the set time, the district judge orders him turned over to the agents from the other state. If the fugitive does apply for habeas corpus, the docket file is given to the superior court clerks and the case becomes a pending case in superior court to be set for hearing by the district attorney.

D. *Place the original Governor's Warrant in the file and return the copy to the Governor's office.* Once the fugitive is turned over to the agents from the other state — either with or without a habeas corpus hearing in superior court — the original Governor's Warrant is returned to the Governor's office and one copy placed in the court record.

DUTIES OF THE DISTRICT ATTORNEY

When the Fugitive Is First Arrested

When first arrested, the fugitive may be given bond by a magistrate unless the crime is one punishable by death or life imprisonment. Whether the defendant is held or released on bond, the magistrate should schedule him for the next session of district court. (If the fugitive is released on bail, the immediate appearance in district court is not required by the statute — the magistrate could schedule the district court appearance 30 days later — but an immediate appearance will usually expedite matters.) At the district court appearance the

judge should inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, review the bail, and see whether it is necessary to appoint an attorney. The fugitive may waive extradition and be turned over to an agent from the other state, or he may be continued on bonded release or in commitment for up to 30 days (from the time of the initial arrest in North Carolina) to await issuance of a Governor's Warrant.

When the Fugitive Appears in District Court at the End of 30 Days

If the recommended procedure has been followed, the fugitive will have already appeared before a district judge once, when first arrested, although it is possible that he may have been released by a magistrate for 30 days without having seen a judge. In either case, the only purpose of this district court appearance is to determine whether the Governor of North Carolina has issued a Governor's Warrant ordering the fugitive's return to the other state. Before the hearing, the district attorney should determine whether the Governor's Warrant has been issued. If so, proceed as indicated below. If not, the fugitive may be held or released on bond for another 60 days to await issuance of the Governor's Warrant. Judges usually continue the case for 30 days at a time. It is recommended that before he asks for another 30-day commitment, the district attorney try to determine whether the other state is diligently pursuing extradition.

When a Governor's Warrant Is Issued

When a Governor's Warrant is issued, the fugitive is to be taken into custody — he may already be in custody if he was not given bail or could not make bail — and brought before a district court judge. The judge is to inform the fugitive of the other state's demand for his surrender, the crime he has been charged with, that he is entitled to counsel, and that he has a reasonable time, set by the judge, within which to apply for a writ of habeas corpus. The fugitive may *not* be turned over to the agent of the other state until this appearance has been held.

When the Fugitive Applies for the Writ of Habeas Corpus

The district attorney is to be notified if the fugitive applies for habeas corpus; the district attorney will represent the State of North Carolina at that hearing. As discussed in the section of this manual entitled SOME LEGAL ISSUES IN EXTRADITION, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition has been made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, plus supporting affidavits, used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or broken the terms of his bail, probation, or parole. The indictment, information, or warrant and affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification can be assisted by

photographs or fingerprints accompanying the extradition papers. Sometimes it may be necessary to bring an identifying witness from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he may show that he was not there when the crime was committed. The defendant's reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present at the time the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with a substantial crime. The defendant may show, by introduction of statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the Court of Appeals.

If the Fugitive Is Also Charged with a Crime in North Carolina

G.S. 15A-739 allows the Governor of North Carolina to delay extradition if the person being sought by the other state has been charged with a crime in North Carolina. The Governor's Extradition Secretary needs to be notified that a North Carolina charge is pending before she issues the Governor's Warrant.

DUTIES OF THE DISTRICT COURT JUDGE

When the Fugitive Is First Arrested

Normally a district court judge will have no involvement in the initial arrest of a fugitive. The judge could be called upon to issue an arrest warrant just as a magistrate would, but that should happen rarely.

First Appearance Before a District Court Judge

The statute requiring a first appearance before a district court judge, G.S. 15A-601, refers to crimes "in the original jurisdiction of the superior court." Because the fugitive is charged with a crime in another state, it is probably not necessary under that statute to hold a first appearance, but it is recommended that magistrates schedule all fugitives, whether committed or released on bail, to appear at the next session of district court. This procedure can expedite matters considerably. At the first appearance, the judge can inform the fugitive of the charge against him, see that he has a copy of the arrest warrant or magistrate's order, and review the bail set by the magistrate. The fugitive may waive extradition at this appearance (see the separate section on waiver below).

At the first appearance the judge should also tell the fugitive that he may apply in writing for a Governor's hearing before a Governor's Warrant is issued. The request must state the grounds for opposing extradition. The only issues that will be considered are: (1) whether the person has been charged in the other state, (2) whether the papers are in proper form, (3) whether the person demanded is the person charged, and (4) whether the accused is a fugitive. A Governor's hearing may be granted or denied in the Governor's discretion.

If the fugitive is granted bail but cannot make it or if he is denied bail, he should be committed to jail to be returned to district court on a specific date within 30 days of his arrest. At that time there will be a determination whether a Governor's Warrant has been issued. If he is released on bond after the first appearance, his release should be conditioned on a return to district court on a specific date within 30 days to determine whether the Governor's Warrant has been issued, or to return whenever the warrant is issued if it is sooner than 30 days.

Usually the first appearance would be used to determine whether counsel should be appointed. Although the extradition statutes, in particular G.S. 15A-730, provide for the fugitive to be notified of the right to counsel *after* the Governor's Warrant has been issued (when the fugitive is taken back into custody and taken before a judge to be informed of his right to apply for habeas corpus), it is recommended that the need for counsel be determined at the first appearance. Doing so often helps in informing the defendant of the extradition process and helping him decide whether to waive formal extradition.

When the Fugitive Returns to Court After 30 Days

Whether the fugitive is out on bond or has been committed to the jail, he is to return to district court within 30 days of his arrest in North Carolina. This appearance is used to determine whether a Governor's Warrant has been issued by the Governor of North Carolina ordering that the fugitive be returned to the other state. If the warrant has been issued, proceed as indicated in the next section. If the Governor's Warrant has not been issued, the fugitive may be continued on bond or committed to jail for up to 60 additional days to await issuance of the Governor's Warrant. The usual practice is to continue the case for 30 days at a time. It is recommended that before an additional 30-day custody is imposed, the district attorney or a law enforcement officer be required to determine whether the other state is diligently pursuing extradition. Of course the fugitive may use this opportunity to waive extradition and return voluntarily to the other state (see below).

When a Governor's Warrant Has Been Issued

Once a Governor's Warrant is issued, G.S. 15A-730 requires that the fugitive be brought before a judge before being delivered to the agent of the other state. Apparently (see discussion on page 382) the fugitive is not entitled to bail after the Governor's Warrant is issued, but in some cases the likelihood of the fugitive returning may be so strong that bail would be appropriate. The magistrate is advised to confer with a judge when he thinks he has such a case. At the district court appearance following the arrest on a Governor's Warrant, the judge is to inform the fugitive of the demand made for his return by the other state, the charge against him in that state, that he has the right to demand and procure counsel, and that he may challenge the legality of his arrest by applying for a writ of habeas corpus. If the fugitive wants counsel and is indigent, the judge should appoint counsel if that has not already been done.

The statute also requires that the fugitive be given a reasonable time within which to apply for habeas corpus. The time limit is to be fixed by the district court judge. The judge should order the fugitive held in the county jail (or other place of confinement) until the time expires for applying for habeas corpus, at which time he is to be turned over to the agent for the other state. It is not appropriate to allow bail at this stage of the process.

If the Fugitive Wishes to Waive Extradition

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; a form is provided in this manual. Before the form is signed, the fugitive must be told that he may refuse to waive extradition and require the other state to make a formal request for extradition and that if a Governor's Warrant is issued, he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be provided to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

DUTIES OF THE SUPERIOR COURT JUDGE

When the Fugitive Is First Arrested

The superior court judge should have no direct involvement in the extradition case unless the fugitive applies for a writ of habeas corpus. The senior resident superior court judge is to issue a bail policy to be used by the magistrates in his district, and that policy should indicate what bond is to be required of a fugitive. The extradition statute on bail, G.S. 15A-736, allows bail to be given unless the offense is punishable by death or life imprisonment. The only form of release allowed by the statute is a secured appearance bond. Once a Governor's Warrant is issued, usually bail will not be allowed, though it could be given (see discussion on pages 377 and 382).

When the Fugitive Applies for a Writ of Habeas Corpus

After the Governor's Warrant is issued, a fugitive may apply for a writ of habeas corpus. As discussed in greater detail in the section of this manual entitled SOME LEGAL ISSUES IN EXTRADITION, the issues that may be raised at the habeas corpus hearing are limited to the following:

Whether the demand for extradition has been made in the proper form. G.S. 15A-723 requires the demand for extradition to include a copy of the indictment, information, or warrant, with supporting affidavits, used to charge the defendant in the other state. If the fugitive is an escapee, the other state must send a copy of the judgment of conviction or the sentence imposed with a statement that the person has escaped or broken the terms of his bail, probation, or parole. The indictment, information, or warrant and supporting affidavit must substantially charge the person with a crime in the other state and must be authenticated by the governor of that state. Minor defects in the wording of the charge from the other state do not invalidate a charge, nor is there any particular form required for the authentication by the Governor.

The identity of the fugitive. The defendant has the burden of showing that he is not the fugitive being sought. Identification can be assisted by photographs or fingerprints accompanying the extradition papers. Sometimes

it may be necessary to bring an identifying witness from the other state. A determination that the defendant is not the fugitive does not prevent a subsequent extradition proceeding against the same person for a similar charge.

Whether the person is a fugitive from the other state. The recital in the Governor's Warrant that the defendant is a fugitive from the other state creates a presumption that he is, placing the burden on the defendant to show otherwise. If the charge is one that required his presence in the other state, he may show that he was not there when the crime was committed. The defendant's reason for leaving the other state is irrelevant. The demand from the other state may omit a statement that the defendant was present at the time the crime was committed, if the nature of the crime is such that his presence is implicit in the commission.

Whether the defendant has been charged with a substantial crime. The defendant may show, by introduction of statutes, that his acts do not amount to a crime in the other state.

The Governor's Warrant is presumed valid and the burden is on the defendant to disprove the allegations. Unless related to one of the issues above, it is not relevant to consider the defendant's guilt or innocence, his alibi, the other state's motive in extraditing, the expiration of the statute of limitations, or any constitutional matter such as whether the defendant is likely to receive a fair trial. Nor are the prison conditions of the other state relevant, though there is some authority that the defendant should be allowed to show great likelihood of being lynched or being subjected to cruel and unusual punishment in the other state.

A judgment denying habeas corpus is a final judgment of the superior court for which the defendant may seek certiorari to the Court of Appeals.

If the Fugitive Wishes to Waive Extradition

At any time after he has been arrested, the fugitive may waive extradition and be delivered to an agent from the other state. G.S. 15A-746 allows the waiver to be made before a judge or a clerk of court. The waiver must be in writing; a form is provided in this manual. Before the form is signed, the fugitive must be told that he may refuse to waive extradition and require the other state to make a formal request for extradition, and that if a Governor's Warrant is issued he may apply for a writ of habeas corpus. When the waiver is signed, one copy is to be forwarded to the Governor's Extradition Secretary and one copy is to be provided to the agent from the other state. The judge should order the fugitive released to that agent. If the agent is not present, the fugitive should be ordered held in jail until he arrives.

[At this point, the Extradition Manual quotes Article 37 (§§ 15A-721 to 15A-750) of G.S. Chapter 15A. The Article has been omitted here as it can be found in Part I of Volume 1C of the General Statutes. — Ed. note.]

SOME LEGAL ISSUES IN EXTRADITION

1. *Is the fugitive entitled to a hearing before a Governor's Warrant can be issued?*

The general rule is that he is not. *Ex Parte Wammack*, 482 S.W.2d 859 (Tex. Crim. App. 1972); *Scheinfain v. Aldredge*, 12 S.E.2d 868 (Ga. 1941); *Application of Dugger*, 497 P.2d 413 (Ariz. Ct. App. 1972); *Horne v. Wilson*, 306 F. Supp. 753 (D. Tenn. 1970).

2. *What issues may the Governor consider in deciding whether extradition is proper in a given case?*

The cases generally hold that the Governor must determine that the accused is a fugitive, that he is substantially charged with a crime in the demanding state, and that the papers from the demanding state are in order. *Reynolds v. Conway*, 288 A.2d 77 (Conn. 1971); *Norton v. State*, 470 P.2d 413 (Idaho 1970); *Moncrief v. Anderson*, 342 F.2d 902 (D.C. Cir. 1964); *In re Maldonado*, 304 N.E.2d 419 (Mass. 1973). What the Governor considers beyond these factors is generally not reviewable by the courts (*e.g., Kujala v. Headley*, 225 N.W.2d 25, in which the Governor's investigation into purposes of prosecution in demanding state was not reviewable). Thus, while asylum courts cannot consider such defenses as denial of speedy trial, *Wise v. State*, 251 N.W.2d 373 (Neb. 1977); threatened mistreatment in the demanding state, *Murray v. Burns*, 405 P.2d 309 (Hawaii, 1965); procedural errors in the accused's trial, *Commonwealth ex rel. Colclough v. Aytch*, 323 A.2d 359 (Pa. Super. 1974); accused's competence to stand trial, *Kellems v. Buchignani*, 518 S.W.2d 788 (Ky. 1974); technical validity of indictment, *Samples v. Cronin*, 536 P.2d 306 (Colo. 1976); *Martinez v. Sheriff of Clark County*, 527 P.2d 1200 (Nev. 1974), etc., the Governor can consider such factors and if he declines to issue a Governor's Warrant, the courts cannot force him to do so. *South Dakota v. Brown*, 144 Cal. Rptr. 758 (1978).

3. *Is a fugitive entitled to be released on bail before the Governor's Warrant is issued?*

G.S. 15A-736 says that the magistrate or judge "may admit the person arrested to bail by bond" unless the person is charged with a crime punishable by death or life imprisonment under the laws of the state in which it was committed. The statute mentions only release by bail with sufficient sureties.

4. *Does a person held for extradition have a right to be released on bail after a Governor's Warrant has been issued?*

The majority rule is that the Uniform Extradition Law *does not* grant a right to bail to a person held for extradition after a Governor's Warrant is issued. *In re Iverson*, 376 A.2d 23 (Vt. 1977); *Matter of Lucas*, 343 A.2d 855 (N.J. Super. 1975), *aff'd* 346 A.2d 624 (N.J. Super. 1975); *Balasco v. State*, 289 So.2d 666 (Ala. App. 1974); *State ex rel. Howard v. St. Joseph Superior Court*, 316 N.E.2d 356 (Ind. 1974). Most courts have also held that judges have no common law or inherent power to grant release on bail in such circumstances (see cases cited above). *But see Carrio v. Watson*, 370 A.2d 950 (Conn. 1976), which held that releasing a fugitive on bail was proper, even after a Governor's Warrant had been served on the fugitive; the opinion was based on the court's common law power to allow bail "in all cases"; and *Ex Parte Quinn*, 549 S.W.2d 198 (Tex. Crim. App. 1977), granting bail based on state statute giving right to bail in "any habeas corpus proceeding" except capital cases.

5. *Is a fugitive entitled to counsel at a habeas corpus hearing to contest the legality of an extradition proceeding?*

Yes, pursuant to G.S. 15A-730, any accused is entitled to have counsel present at such hearings. Most courts have held that counsel in such cases is

required solely by statute and is not constitutionally required under the Sixth Amendment. *Hystad v. Rhay*, 533 P.2d 409 (Wash. App. 1975); *Wertheimer v. State*, 201 N.W.2d 383 (Minn. 1972); *Roberts v. Hocker*, 456 P.2d 425 (Nev. 1969). Courts have, nevertheless, held that counsel must be appointed for indigents contesting extradition proceedings at habeas corpus proceedings. *People v. Braziel*, 169 N.W.2d 513 (Mich. App. 1969); *Ex Parte Turner*, 410 S.W.2d 639 (Tex. Crim. App. 1967). In North Carolina, G.S. 7A-451(a)(5) entitles an indigent held for extradition to appointed counsel. Appointed counsel is not required at an initial arraignment on a fugitive warrant or at a hearing before the Governor. *Rutledge v. Preadmore*, 176 N.W.2d 417 (Mich. App. 1970).

6. *On what grounds may a fugitive attack a Governor's Warrant in a habeas corpus proceeding?*

The general rule in a habeas corpus proceeding in which a person is held for extradition is that the court may consider only: (1) whether the accused is the person being demanded by the demanding state; (2) whether the accused was present in the demanding state when the crime took place (except for proceedings arising under G.S. 15A-726); (3) whether the accused is charged with a criminal offense; and (4) whether the paperwork in the case is in order. *Michigan v. Doran*, 439 U.S. 282 (1978); *State ex rel. DeGideo v. Talbot*, 250 N.W.2d 169 (Minn. 1977); *People ex rel. Kubala v. Woods*, 284 N.E.2d 286 (Ill. 1972); *U.S. ex rel. Tyler v. Henderson*, 453 F.2d 790 (5th Cir. 1971). The defendant's evidence must be conclusive; mere conflicting testimony as to an accused's absence from the demanding state at the time of trial will not support the accused's release from custody at a habeas corpus proceeding. *People ex rel. Garner v. Clutts*, 170 N.E.2d 538 (Ill. 1970); *State ex rel. Zack v. Kriss*, 74 A.2d 25 (Md. 1952).

7. *Must an indictment, information, or warrant from the demanding state be accompanied by affidavits or other documents showing the basis for the probable cause to arrest the fugitive?*

Courts generally hold that an indictment carries with it a sufficient finding of probable cause so that an asylum state may not look behind the document to see for itself whether probable cause exists. *U.S. ex rel. Davis v. Behagen*, 436 F.2d 596 (2d Cir. 1970); *People v. Jackson*, 502 P.2d 1106 (Colo. 1972).

If the documents sent by the demanding state do not contain an indictment, they must show that a detached and neutral judicial official in the demanding state has found probable cause to exist in the case; if the Governor in the asylum state decides to issue a Governor's Warrant, the courts in the asylum state may not review the documents to see whether they contain a showing of probable cause. *Michigan v. Doran*, 439 U.S. 282 (1978).

8. *What is the standard of proof required for a fugitive who is attacking a Governor's Warrant in a habeas corpus proceeding? Does the state have the burden of producing evidence if a defendant introduces evidence contesting his status as a fugitive?*

A Governor's Warrant creates a presumption of regularity in an extradition proceeding, and a fugitive who wishes to attack the warrant must show by clear and convincing evidence that the warrant is invalid. *People ex rel. Harris v. Warden*, 345 N.Y.S.2d 29 (App. Div. 1973); *Stolz v. Miller*, 543 P.2d 513 (Colo. 1975); *McCollough v. Darr*, 548 P.2d 1245 (Kan. 1976). Other cases have formulated the standard of proof as requiring "conclusive" evidence, *People ex rel. Pirone v. Police Comm'r*, 225 N.Y.S.2d 257 (App. Div. 1962); or as requiring "clear and satisfactory" evidence, *State ex rel. Rhodes v. Omodt*, 218 N.W.2d 461 (Minn. 1974).

States differ on whether the prosecution must present evidence to rebut an alleged fugitive's evidence. In *Rhodes*, the court held that the state must

present "minimal" evidence rebutting an alleged fugitive's evidence that he was not in the demanding state at the time of the crime; in *Stolz*, the court held that a statement by an alleged fugitive does not necessarily rebut the presumption of regularity created by the Governor's Warrant.

DETAINERS

Sometimes a person who is wanted for prosecution is already in prison. A prosecutor may lodge a "detainer" against the prisoner by notifying the prison authorities that the person has charges pending against him and thus prevent release of the prisoner without notice to the prosecutor. Virtually all the states, including North Carolina, have joined an Interstate Agreement on Detainers that establishes procedures for resolving pending charges against a prisoner early in his detention in another state. This section of the Extradition Manual gives a brief explanation of the detainer procedure.

The Interstate Agreement on Detainers is found in G.S. 15A-761. The Agreement allows both the prisoner and the prosecutor to request early resolution of charges outstanding against the prisoner. The prison officials who have custody of the prisoner are required to notify him of any detainers lodged against him. He may then request final disposition of the charges. When the prisoner makes such a request, the prison officials notify the prosecutor in the other state and offer him the opportunity to take custody of the prisoner. The prosecutor must try the case within 180 days of the delivery of the prisoner. A delay in the trial deadline may be granted for good cause by a judge if either the prisoner or his lawyer is present.

If detainers have been lodged for other charges from the same state, the prosecutors responsible for the other charges are also notified of the prisoner's request for final disposition. His request is considered a request for disposition of all charges pending in that state. Failure to prosecute any of the charges pending against the prisoner in that state within the 180-day period, or the extended deadline, means dismissal of the charges with prejudice.

The prosecutor also has the power to force an early trial. When a prosecutor has a charge against a prisoner in another state, the prosecutor may request temporary custody for trial. The governor of the other state can refuse to grant that request, but if he agrees, or if he does not object within 30 days, the prisoner is turned over for prosecution. The trial must be held within 120 days of receiving custody of the prisoner — again with delays possible for good cause — or the charges must be dismissed with prejudice. Each prosecutor in the state who has a detainer on the prisoner is notified that he is being returned for prosecution so that they may make their own requests for temporary custody.

After trial, the prisoner is returned to the state where he was serving his sentence. Once he completes his sentence in the state where he was originally in prison, he is given back to the other state to serve the sentence imposed there.

An Administrator for the Interstate Agreement on Detainers is employed in the Department of Corrections. The Administrator can provide additional information on detainers and the forms to be used in the procedures described above.

FORMS

STATE OF NORTH CAROLINA

County of _____

The State of North Carolina Vs.

_____
Defendant

In the General Court of Justice

_____ Court Division

FUGITIVE AFFIDAVIT
(To be used with ARREST WARRANT or MAGISTRATE'S ORDER FOR FUGITIVE)

_____, being duly sworn states

that he has received:

☐ a NCIC-PIN message which is attached;

☐ a copy of a (warrant) (indictment) from _____ County,

State of _____, which is attached;

☐ A telephone call from _____, who is

_____ in _____ County,
(name position)

State of _____;

stating that the defendant named above has been (charged with) (convicted of) the crime of

_____ in the State of _____

_____, which crime was committed on or about the _____ day of _____,

19__.

Disregard language next to boxes that are not checked.

☐ The crime with which the defendant has been charged in that other state is punishable there by death or by imprisonment for a term exceeding one year.
(Note: The requirement that the crime be punishable by death or more than one year's imprisonment applies only if the defendant has been arrested without a warrant and the officer is now seeking a Magistrate's Order.)

The affiant further states that he has reasonable grounds to believe that:

☐ the defendant named above has fled from justice in that other state;
(Note: Use this choice if the person has not yet been convicted.)

☐ on or about the _____ day of _____, 19__, the defendant named above did escape from confinement imposed as a result of his conviction of the crime named above in the criminal courts of the county and state named above;

☐ on or about the _____ day of _____, 19__, the defendant named above did break the terms of his (bail) (probation) (parole) imposed as a result of his conviction of the crime named above in the criminal courts of the county and state named above;

and that the affiant has reasonable grounds to believe that the defendant named above is now in the State of North Carolina and is subject to arrest under the provisions of G.S. 15A-733 and/or G.S. 15A-734.

_____
Affiant

Sworn and subscribed before me this the

_____ day of _____, 19___

_____
Judge/Magistrate

(This form prepared by the Institute of Government, The University of North Carolina at Chapel Hill, September 1979)

STATE OF NORTH CAROLINA

County of _____

The State of North Carolina Vs.

_____
Defendant

_____
Age Race Sex Occupation

_____
Address

File # _____

File # _____

In the General Court of Justice

_____ Court Division

WARRANT FOR ARREST

FOR FUGITIVE

To any officer with authority and territorial jurisdiction to execute a warrant for arrest for the offense charged below:

Based on the attached affidavit, the UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that:

☐ On or about the _____ day of _____, 19___, the crime of _____ _____ was committed in the State of _____, and that the defendant named above was charged in the criminal courts of _____ County, State of ___ _____, with the commission of that crime, and that since that time the defendant has fled from justice in that state and is now in the State of North Carolina and subject to arrest under the provisions of G.S. 15A-733.

☐ On or about the _____ day of _____, 19___, the defendant named above

- ☐ escaped from confinement
- ☐ broke the terms of his (bail) (probation) (parole)

imposed as the result of his conviction of the crime of _____ _____ in the criminal courts of _____ County, State of _____, and that the defendant is now in the State of North Carolina and is subject to arrest under the provisions of G.S. 15A-733.

Disregard language next to boxes that are not checked.

YOU ARE DIRECTED TO ARREST THE DEFENDANT NAMED ABOVE AND BRING HIM WITHOUT UNNECESSARY DELAY BEFORE A JUDICIAL OFFICIAL TO ANSWER THE CHARGES SET OUT ABOVE.

Issued this _____ day of _____, 19___, upon information furnished under oath by the complainant or complainants named below.

Complainant(s) Name, Address or Department

_____
Assistant Deputy Clerk of Superior Court
Magistrate

SEE IMPORTANT INFORMATION ON THE OTHER SIDE OF THIS FORM

File Number _____

THE STATE
Vs.

WARRANT FOR ARREST FOR FUGITIVE

Issued _____ day of _____, 19__

For State: _____

WITNESSES

For Defendant: _____

This form prepared by the Institute of Government, The University of North Carolina at Chapel Hill
September 1979

If this warrant for arrest if not executed within 180 days, it must be returned to the clerk of the county in which it was issued with the reason for the failure of execution noted thereon. The officer must state all the steps taken by his department in attempting to execute the warrant and any information obtained about the location of the defendant.

OFFICER'S RETURN

I certify that this warrant was received on the _____ day of _____, 19___.

☐ It was executed on the _____ day of _____, 19___ by arresting the defendant and bringing him before _____.

☐ It was not executed for the following reason: _____

This _____ day of _____, 19___.

Department County or City Law Enforcement Officer

IMPORTANT INFORMATION FOR THE PERSON ARRESTED

You have been arrested as a fugitive from justice in another state, as stated on the other side of this form. If that other state requests your return, the Governor of North Carolina will consider whether you should be extradited. You may challenge the legal sufficiency of the other state's request for your extradition. To do so, you must submit a written request to the Governor of North Carolina for an extradition hearing. The Governor will decide whether a hearing should be held. If the Governor decides that you should be returned to the other state, either with or without a hearing, he will issue a Governor's Warrant authorizing officers in this state to place you in the custody of agents from that other state. However, the law of North Carolina provides that you have the following rights in this matter:

* You may not be handed over to the agent of the other state until you have appeared in front of a North Carolina judge. That judge will tell you what crime you have been charged with and that the other state has demanded your surrender.
* You are entitled to have an attorney represent you.
* If you cannot afford to hire your own attorney, you are entitled to have an attorney appointed to represent you.
* You (or your attorney) are entitled to challenge the legality of your arrest. If you wish to challenge the legality of your arrest after the Governor's Warrant has been issued, you will be given a reasonable time to apply for a writ of habeas corpus.

If you wish, you may give up your right to have a Governor's Warrant issued, or you may give up the rights listed above, and you will be handed over immediately to an agent of the other state to take you to that state. But you *do not* have to give up any of these rights and you may not be forced to do so.

STATE OF NORTH CAROLINA

County of _____

The State of North Carolina Vs.

_____
Defendant

_____
Age Race Sex Occupation

_____
Address

File # _____

File # _____

In the General Court of Justice

_____ Court Division

MAGISTRATE'S ORDER

FOR FUGITIVE

On the basis of the attached affidavit, the undersigned finds that the defendant named above has been arrested without a warrant and his detention is justified because there is probable cause to believe that on or about the _____ day of _____, 19___, the crime of _____ was committed in the State of _____, and that the defendant named above has been charged in the criminal courts of _____ County, State of _____, with the commission of that crime, which is punishable in that state by death or by imprisonment for a term exceeding one year, that the defendant had fled from justice in that state and is subject to arrest under the provisions of G.S. 15A-734.

Issued this _____ day of _____, 19___, upon information furnished under oath by the arresting officer or officers named below. The undersigned has this day delivered a copy of this order to the defendant.

Name and Department of Arresting Officer(s)

_____
Assistant Deputy Clerk of Superior Court
Magistrate

SEE IMPORTANT INFORMATION ON THE OTHER SIDE OF THIS FORM

File Number _____

THE STATE
Vs.

MAGISTRATE'S ORDER FOR FUGITIVE

Issued _____ day of _____, 19__

WITNESSES

For State: _____

For Defendant: _____

This form prepared by the
Institute of Government
The University of North Carolina
at Chapel Hill
September 1979

APPENDIX V—EXTRADITION

IMPORTANT INFORMATION FOR THE PERSON ARRESTED

You have been arrested as a fugitive from justice in another state, as stated on the other side of this form. If that other state requests your return, the Governor of North Carolina will consider whether you should be extradited. You may challenge the legal sufficiency of the other state's request for your extradition. To do so, you must submit a written request to the Governor of North Carolina for an extradition hearing. The Governor will decide whether a hearing should be held. If the Governor decides that you should be returned to the other state, either with or without a hearing, he will issue a Governor's Warrant authorizing officers in this state to place you in the custody of agents from that other state. However, the law of North Carolina provides that you have the following rights of this matter:

* You may not be handed over to the agent of the other state until you have appeared in front of a North Carolina judge. That judge will tell you what crime you have been charged with and that the other state has demanded your surrender.
* You are entitled to have an attorney represent you.
* If you cannot afford to hire your own attorney, you are entitled to have an attorney appointed to represent you.
* You (or your attorney) are entitled to challenge the legality of your arrest. If you wish to challenge the legality of your arrest after the Governor's Warrant has been issued, you will be given a reasonable time to apply for a writ of habeas corpus.

If you wish, you may give up your right to have a Governor's Warrant issued, or you may give up the rights listed above, and you will be handed over immediately to an agent of the other state to take you to that state. But you *do not* have to give up any of these rights and you may not be forced to do so.

STATE OF NORTH CAROLINA)
)
v.) WAIVER OF EXTRADITION
)
_____) G.S. 15A-746
Defendant

Having been arrested in this state and charged with committing the crime of _____

_____

in _____ County, State of _____,
and understanding that authorities from such state are demanding my return for trial, I do hereby waive the issuance and service of the Governor's Warrant provided for in G.S. 15A-727 and -728, and all other procedures incident to extradition. In open court I consent to return to the demanding state upon the arrival of the authorities from that state, and do hereby waive extradition. Before I signed this waiver, the court informed me of my right to the issuance and service of a warrant of extradition, my right to legal counsel, and of my right to apply for a writ of habeas corpus, as provided in G.S. 15A-730.

_____
Defendant's Signature

As (judge) (clerk) of _____ Court of _____ County, a court of record, I certify that the above-named defendant appeared before me this date. I informed him of his legal rights with respect to extradition, and he voluntarily signed the above waiver of extradition in my presence.

This the _____ day of _____, 19 __.

_____
(Judge) (Clerk) of _____ Court

_____
Typed Name of Judge or Clerk

STATE OF NORTH CAROLINA

Application for Requisition
(Normal)

TO THE GOVERNOR OF NORTH CAROLINA, THE HONORABLE _____:

I, _____
(name and full address of district attorney)

_____;

as (District Attorney) (Assistant District Attorney) for the _____

Prosecutorial District, _____, North Carolina,

apply for the requisition and return to North Carolina of _____

_____.
(full name of fugitive)

That defendant stands charged by the accompanying certified copy of the

(warrant) (indictment), now pending in the _____ Court of

_____ County, with the crime of _____

_____
(state name of crime and give General Statute citation)

_____

_____.

That crime was committed while the defendant named above was present in that

county on or about the _____ day of _____, 19 __, but since the commission of the crime he has fled from the jurisdiction of North Carolina to avoid prosecution and is now a fugitive from justice who (is under arrest and held at) (has been arrested and released on bond at) _____

_____
(give complete address)

_____

in the State of _____. The information that

the defendant is located in that place comes to me from _____

_____
(give name, office and address of source)

_____.

Application for Requisition, continued

Justice requires that the defendant be brought back to North Carolina for trial. I believe that the facts stated in the (warrant) (indictment) are true and that prosecution of the defendant would result in his conviction for the crime with which he is charged.

I nominate _____

_____

(give name, office, address and phone number for agent)

_____

_____

to be appointed and commissioned by you as the agent of North Carolina to receive the defendant and deliver him to the custody of the Sheriff of _____ _____ County. The agent has no private interest in the proposed arrest, nor is this requisition sought to collect a private debt, enforce a civil remedy, or otherwise answer any private end.

Use the following blanks to explain why this application is made if there has been a previous application or if there has been a considerable lapse of time since the commission of the crime. Also use these blanks to explain what the defendant did that caused the crime in North Carolina if he was not in the state at the time the crime occurred but extradition is sought under Section 6 of the Uniform Extradition Act (G.S. 15A-726):

_____

_____

_____

_____

_____

Respectfully submitted,

_____

Sworn to and subscribed to before me, this the _____ day of _____, 19 _____

_____
(Clerk/ Assistant Clerk/ Deputy Clerk of Superior Court)

_____
County and Address

STATE OF NORTH CAROLINA

Application for Requisition
(Defendant Already Convicted)

TO THE GOVERNOR OF NORTH CAROLINA, THE HONORABLE _____:

I, _____
(name and full address)

_____

the _____,
(office)
apply for the requisition and return to North Carolina of _____

_____
(full name of fugitive)
who was convicted of the crime of _____

_____

in the _____ Court of _____ County, on the

_____ day of _____, 19 ___, as stated in the accompanying copy of the judgment and sentence. Since that conviction the person named above has fled from North Carolina in violation of _____

_____
(the crime of escape, probation, parole, bond on appeal)
and (is now under arrest and held at) (has been arrested and released on bond at) _____
(give complete address)

_____

in the State of _____. The information that the person is located in that place comes to me from _____

_____
(give name, office and address of source)

_____.

The extradition of the person named above is sought, and the ends of justice require that he be returned, for the purpose of (trial) (hearing) on the _____ in violation
(crime of escape or revocation of probation or parole)

Application for Requisition, continued

of North Carolina General Statute _____, and I believe that there is sufficient evidence to (convict the defendant) (prove the defendant's violation) of that charge. The facts supporting this charge are contained in the accompanying (warrant and affidavit) (indictment) (affidavit of the officer from whose custody the defendant escaped) (certificate of parole and revocation of parole) (certificate of conditional release and revocation of conditional release).

I nominate _____

_____

(give name, office, address and phone number for agent)

_____

to be appointed and commissioned by you as the agent of North Carolina to receive the defendant and deliver him to the custody of the Sheriff of

_____ County. The agent has no private interest in the proposed arrest, nor is this requisition sought to collect a private debt, enforce a civil remedy, or to otherwise answer any private end.

Use the following blanks to explain why this application is made if there has been a previous application or if there has been a considerable lapse of time since the commission of the crime:

_____

_____

_____

_____

_____

Respectfully submitted,

_____

Sworn to and subscribed to before me, this the _____ day of _____, 19 _____

_____

(Clerk/ Assistant Clerk/ Deputy Clerk of Superior Court)

_____

County and Address

OFFICE OF THE GOVERNOR
Request for Reimbursement of
Expenditures in Returning a Fugitive
to North Carolina

This is to certify that the expenses as shown below are true and accurate and were necessary in returning _____

fugitive(s), to _____ City/County of North Carolina to stand trial on the felony charge(s) of _____

_____

Date left North Carolina _____ Returned _____

	City/County Complete	Governor's Office Complete
Subsistence: Overnight		
No. days _____ x State Rate x _____ No. Officers		$_____
No Overnight		
No. days _____ x State Rate x _____ No. Officers		$_____
Travel:		
Mileage (Round Trip) to _____		
_____ _____ miles		$_____
Air Travel Actual Cost (Attach Receipt)	$_____	$_____
Other Expense--Explain in Detail on Back	$_____	$_____
Due City/County		$_____

_____ Police Chief/Sheriff

This is to certify that the above named fugitive was returned to North Carolina on _____ felony charge as shown above.

_____ District Attor

Instructions:

(1) Use this form for each trip when picking up a fugitive. If more than one fugitive picked up on a single trip, include *all* expenses on this form.
(2) Do not itemize subsistence expenses. Reimbursement is at the set state rates ($45 day for overnight travel, $16.50 for travel not involving an overnight stay), regardless of the actual expenses for room and meals.
(3) Send *three* copies of the form to the Governor's office.
(4) If the district attorney is not available, have the clerk of court sign the certification.
(5) The only receipt that needs to be attached is the receipt for air fare.

Appendix V-A. Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission

Editor's Note. — These rules were adopted Sept. 25, 1975.

Rule

1. Definitions
2. Petition for Hearing
   (a) Notice to Judge
   (b) Petition for Hearing
   (c) Failure to File Petition
   (d) Briefs
   (e) Oral Argument
3. Decision by the Court
4. Reproduction of Record and Briefs
5. Costs

Rule 1

Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) Commission means the Judicial Standards Commission.

(b) Judge or respondent means a justice or judge of the General Court of Justice who has been recommended for censure or removal under N. C. Gen. Stat. ch. 7A, art. 30 (1974 Supp.).

(c) Court means the Supreme Court of North Carolina. Clerk means the Clerk of the Supreme Court.

(d) Commission's attorney means the attorney who represented the Commission at the hearing which resulted in the recommendation under consideration by the Court.

(e) The masculine gender includes the feminine gender.

(f) Service of a document required to be served means either mailing the document by U.S. certified mail, return receipt requested, to the person to be served or service in the manner provided in Rule 4 of the N.C. Rules of Civil Procedure.

Rule 2

Petition for Hearing

(a) **Notice to Judge.** When the Commission, pursuant to its Rule 19, files with the Clerk a recommendation that a judge be censured or removed, the Clerk shall immediately transmit a copy of the recommendation by U.S. certified mail, return receipt requested, to the respondent named therein.

(b) **Petition for Hearing.** The respondent may petition the Court for a hearing upon the Commission's recommendation. The petition shall be signed by the judge or his counsel of record and specify the grounds upon which it is based. It must be filed with the Clerk within 10 days from the date shown on the return receipt as the time the respondent received the copy of the recommendation from the Clerk. At the time the petition is filed it shall be accompanied by a certificate showing service of a copy of the petition upon the Commission's attorney and its chairman or secretary. Upon the filing of his petition, the respondent becomes entitled under G.S. 7A-377 to file a brief and,

upon filing a brief, to argue his case to the Court, in person and through counsel.

(c) **Failure to File Petition.** If a respondent fails to file a petition for hearing within the time prescribed, the Court will proceed to consider and act upon the recommendation on the record filed by the Commission. Failure to file a petition waives the right to file a brief and to be heard on oral argument.

(d) **Briefs.** Within 15 days after filing his petition, the respondent may file his brief with the Clerk. At the time the brief is filed the respondent shall also file a certificate showing service of a copy of the brief upon the Commission's attorney and its chairman or secretary. Within 15 days after the service of such brief upon him, the Commission's attorney may file a reply brief, together with a certificate of service upon the respondent and his attorney of record. The form and content of briefs shall be similar to briefs in appeals to the Court.

(e) **Oral Argument.** After the briefs are filed, and as soon as may be, the Court will set the case for argument on a day certain and notify the parties. Oral arguments shall conform as nearly as possible to the rules applicable to arguments on appeals to the Court. A judge who has filed a brief may, if he desires, waive the oral argument. A judge who has filed a petition but who has not filed a brief will not be heard upon oral argument.

Rule 3

Decision by the Court

After considering the record, and the briefs and oral arguments if any, the Court will act upon the Commission's recommendation as required by G.S. 7A-377. The decision on a recommendation for removal shall be by a written opinion filed and published as any other opinion of the Court. Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports.

Effect of Amendments. — The amendment adopted April 14, 1976, substituted "and published in the Advance Sheets and bound volumes of the Supreme Court Reports" for "as a part of the record of the proceeding" in the last sentence.

Rule 4

Reproduction of Record and Briefs

As soon as the Commission files with the Clerk a recommendation of censure or removal and the transcript of the proceedings on which it is based, the Clerk will reproduce and distribute copies of the record as directed by the Court. When briefs are filed, one copy will suffice. The Clerk will also reproduce and distribute copies of the briefs as directed by the Court.

Rule 5

Costs

If the Court dismisses the Commission's recommendation the costs of the proceeding will be paid by the State; otherwise, by the judge. Reproduction and other costs in this Court will be taxed as in appeals to the Court, except there will be no filing fee.

Appendix VI. Rules, Regulations and Organization of The North Carolina State Bar

Article III.

Election and Succession of Officers.

Sec.

1. Officers.
2. Eligibility for Office.
3. Term of Office.
4. Elections.
5. Nominating Committee.
6. Vacancies and Succession.
7. Removal from Office.

Article IV.

Duties of Officers.

1. Compensation of Officers.
2. President.
3. President-Elect, Vice-President, and Immediate Past President.
4. Secretary-Treasurer.

Article VI.

Meetings of the Council.

5. Standing Committees of the Council.

Article IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

1. General Provisions.
2. Proceeding for Discipline.
3. Definitions.
4. State Bar Council — Powers and Duties in Discipline and Disability Matters.
5. Chairman of the Grievance Committee — Powers and Duties.
6. Grievance Committee — Powers and Duties.

Sec.

7. Counsel — Powers and Duties.
8. Chairman of the Hearing Commission — Powers and Duties.
9. Hearing Committee — Powers and Duties.
10. Secretary — Powers and Duties in Discipline and Disability Matters.
11. Grievances — Form and Filing.
12. Investigation; Initial Determination.
13. Preliminary Hearing.
14. Formal Hearing.
15. Effect of a Finding of Guilt in Any Criminal Case.
16. Reciprocal Discipline.
17. Surrender of License While Proceeding Pending.
18. Disability Hearings.
19. Enforcement of Powers.
20. Notice to Accused of Action and Dismissal.
21. Notice to Complainant.
22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or Is Transferred to Inactive Status Because of Disability.
23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.
24. Notice to Clients of Disbarred or Suspended Attorneys.
25. Reinstatement.
26. Address of Record.
27. Disqualification Due to Interest.
28. Trust Accounts; Audit.
29. Confidentiality.

Article III.

Election and Succession of Officers.

§ 1. Officers.

a. The Officers of the North Carolina State Bar and the Council shall consist of a President, a President-Elect, a Vice-President, and an Immediate Past President. These officers shall be deemed members of the Council in all respects.

b. There shall be a Secretary-Treasurer who shall also have the title of Executive Director. The Secretary-Treasurer shall not be a member of the Council.

§ 2. Eligibility for Office.

The President, President-Elect, and Vice-President need not be members of the Council at the time of their election.

§ 3. Term of Office.

The term of each office shall be one year beginning at the conclusion of the annual meeting. Each officer will hold office until a successor is elected and qualified.

The President shall assume the office of Immediate Past President at the conclusion of the term as President. The President-Elect shall assume the office of President at the conclusion of the annual meeting following the term as President-Elect.

§ 4. Elections.

a. A President-Elect, Vice-President and Secretary-Treasurer shall be elected annually by the Council at an election to take place at the Council meeting held during the annual meeting of the North Carolina State Bar. All elections will be conducted by secret ballot.

b. If there are more than two candidates for an office, then any candidate receiving a majority of the votes shall be elected. If no candidate receives a majority, then a run-off shall be held between the two candidates receiving the highest number of votes.

§ 5. Nominating Committee.

a. There shall be a Committee appointed to nominate one or more candidates for each of the offices which will meet prior to the Council meeting at which the election will be held. The nominating committee shall be composed of the Immediate Past President and the five most recent, living Past Presidents. The nominating committee shall submit its nominations by report to the Secretary 45 days prior to the election and the Secretary shall transmit the report by mail to the Council at least 30 days prior to the election.

b. The floor shall be open for additional nominations for each office at the time of the election.

§ 6. Vacancies and Succession.

a. If the office of President becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the President-Elect shall become President for the unexpired term and the next term. If the office of the President-Elect becomes vacant because the President-Elect must assume the presidency under the foregoing provision of this section, then the Vice-President shall become the President-Elect for the unexpired term and at the end of the unexpired term to which the Vice-President ascended the office will become vacant and an election held in accordance with section 4 a. of this Article; if the office of President-Elect becomes vacant for any other reason, the Vice-President shall become the President-Elect for the unexpired term following which said officer shall assume the presidency as if elected President-Elect. If the office of Vice-President or Secretary-Treasurer becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of President or President-Elect becomes vacant without an available successor under these provisions then the office will be filled by election by the Council at a special meeting of the Council with such notice as required by Article VI, § 2 or at the next regularly scheduled meeting of the Council.

b. If the President is absent or unable to preside at any meeting of the North Carolina State Bar or the Council, the President-Elect shall preside, or if the President-Elect is unavailable, then the Vice-President shall preside. If none are available, then the Council shall elect a member to preside during the meeting.

c. If the President is absent from the State or for any reason is temporarily unable to perform the duties of office, the President-Elect shall assume those duties until the President returns or becomes able to resume the duties. If the President-Elect is unable to perform the duties, then the Council may select one of its members to assume the duties for the period of inability.

§ 7. Removal from Office.

The Council may, upon giving due notice and an opportunity to be heard, remove from office any officer found by the Council to have engaged in misconduct or to have a disability, including misconduct not related to the office but so infamous as to render the offender unfit for the office, misconduct amounting to noncriminal misconduct in office and misconduct which is both criminal and misconduct in office.

Effect of Amendments. — The amendment adopted April 8, 1983, rewrote this Article. The Article heading was also amended.

Article IV.

Duties of Officers.

§ 1. Compensation of Officers.

The Secretary-Treasurer shall receive a salary fixed by the Council. All other officers shall serve without compensation except the per diem allowances fixed by statute for members of the Council.

§ 2. President.

The President shall preside over meetings of the North Carolina State Bar and the Council. The President shall sign all resolutions and orders of the Council in the capacity of President. The President shall execute, along with the Secretary-Treasurer, all contracts ordered by the Council. The President will perform all other duties prescribed for the office by the Council.

§ 3. President-Elect, Vice-President, and Immediate Past President.

The President-Elect, Vice-President, and Immediate Past President will perform all duties prescribed for the office by the Council.

§ 4. Secretary-Treasurer.

The Secretary-Treasurer shall attend all meetings of the Council and of the North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President, President-Elect or Vice-President, execute all contracts ordered by the Council. He shall have custody of the seal of the North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take

charge of all funds paid into the North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of the North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of the North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of the North Carolina State Bar. The books of accounts shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

Effect of Amendments. — The amendment adopted April 8, 1983, rewrote this Article.

Article VI.

Meetings of the Council.

§ 5. Standing Committees of the Council.

Within twenty (20) days after his election, the President of the Council shall select the standing committees to serve for one year beginning January 1 of the year succeeding his election which said committees shall consist of:

c. Committee on Grievances. —
Grievance Committee of not less than fifteen members, one of whom shall be designated as Chairman and one as Vice-Chairman. The Committee shall have as members at least three councillors from districts in each of the court divisions of the State. The Grievance Committee shall have the powers and duties set forth in Article IX of these rules, and shall report on the status of grievances, investigations and complaints at regular or special meetings of the Council as the Executive Committee may direct.

e. Committee on Unauthorized Practice of not less than three Councillors selected by the President.

§ 1. General Provisions.
The purpose for establishing a committee on the unauthorized practice of law and the reasons for the prohibition against the practice of law by those who have not been examined, found qualified to practice law and licensed to practice law is to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the Code of Professional Responsibility which in the public interest, lawyers are bound to observe.

§ 2. Proceeding for Prohibition of Unauthorized Practice of Law.
The procedure to prevent and restrain the unauthorized practice of law shall be in accordance with the provisions hereinafter set forth.
District Bars shall not conduct separate proceedings into unauthorized practice of law matters, but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged unauthorized practice of law.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter,

the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) Appellate Division: The Appellate Division of the General Court of Justice.

(2) Chairman of the Unauthorized Practice of Law Committee: councillor appointed to serve as chairman of the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(3) Complainant or Complaining Witness: any person who has complained of the conduct of any person, firm or corporation as relates to alleged unauthorized practice of law.

(4) Complaint: a formal pleading filed in the name of The North Carolina State Bar in the Superior Court against a person, firm or corporation after a finding of probable cause.

(5) Council: the Council of The North Carolina State Bar.

(6) Councillor: a member of The Council of The North Carolina State Bar.

(7) Counsel: the Counsel of The North Carolina State Bar appointed by the Council.

(8) Court or Courts of this State: a court authorized and established by the Constitution or laws of the State of North Carolina.

(9) Defendant: any person, firm or corporation against whom a complaint is filed after a finding of probable cause.

(10) Unauthorized Practice of Law Committee: the Unauthorized Practice of Law Committee of The North Carolina State Bar.

(11) Investigation: the gathering of information with respect to alleged unauthorized practice of law.

(12) Investigator: any person designated to assist in investigation of alleged unauthorized practice of law.

(13) Letter of Caution: communication from the Unauthorized Practice of Law Committee to any person stating that past conduct of the person, while not the basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.

(14) Letter of Notice: a communication to an accused individual or corporation setting forth the substance of the alleged conduct involving unauthorized practice of law.

(15) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(16) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(17) Party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused individual or corporation as defendant.

(18) Plaintiff: after a complaint has been filed, The North Carolina State Bar.

(19) Preliminary Hearing: hearing by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(20) Probable Cause: a finding by the Unauthorized Practice of Law Committee that there is reasonable cause to believe that a person or corporation is guilty of unauthorized practice of law justifying legal action against such person or corporation.

(21) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(22) Supreme Court: the Supreme Court of North Carolina.

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise the administration of Unauthorized Practice of Law Committee in accordance with the provisions hereinafter set forth.

(2) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

§ 5. Chairman of the Unauthorized Practice of Law Committee — Powers and Duties.

(A) The Chairman of the Unauthorized Practice of Law Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Unauthorized Practice of Law Committee that an investigation be initiated.

(3) To recommend to the Unauthorized Practice of Law Committee that a complaint be dismissed.

(4) To direct a Letter of Notice to accused person or corporation.

(5) To notify an accused and any complainant that a complaint has been dismissed.

(6) To call meetings of the Unauthorized Practice of Law Committee for the purpose of holding preliminary hearings.

(7) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(8) To administer oaths or affirmations to witnesses.

(9) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Unauthorized Practice of Law Committee shall perform the functions of the Chairman of the Unauthorized Practice of Law Committee in any matter when the Chairman is absent or disqualified.

§ 6. Unauthorized Practice of Law Committee — Powers and Duties.

The Unauthorized Practice of Law Committee shall have the power and duty:

(1) To direct the Counsel to investigate any alleged unauthorized practice of law by any person, firm or corporation in the State of North Carolina.

(2) To hold preliminary hearings, find probable cause and direct the complaints be filed.

(3) To dismiss complaints upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused in cases wherein unauthorized practice of law is not established but the activities of the accused are deemed to be improper or may become the basis for unauthorized practice of law if continued or repeated.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged unauthorized practice of law whether initiated by the filing of complaint or otherwise.

(2) To recommend to the Chairman of the Unauthorized Practice of Law Committee that a matter be dismissed because the complaint is frivolous or falls outside the Council's jurisdiction; that a Letter of Notice be issued; or that the matter be passed upon by the Unauthorized Practice of Law Committee to determine whether probable cause exists.

(3) To prosecute all unauthorized practice of law proceedings before the Unauthorized Practice of Law Committee and the courts.

(4) To represent The North Carolina State Bar in any trial or other proceedings concerned with the alleged unauthorized practice of law.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by the Unauthorized Practice of Law Committee or any other agency or court concerning any motion or other matter arising out of an unauthorized practice of law proceeding.

(6) To employ assistant counsel, investigators, and other administrative personnel in such numbers as the Council may from time to time authorize.

(7) To maintain permanent records of all matters processed and the disposition of such matters.

(8) To perform such other duties as the Council may from time to time direct.

§ 8. Secretary — Powers and Duties in Unauthorized Practice of Law Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President or the Chairman of the Unauthorized Practice of Law Committee.

(3) To maintain a record and file of all complaints not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Unauthorized Practice of Law Committee.

§ 9. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Unauthorized Practice of Law Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the complaint as may be appropriate and submit to the Chairman of the Unauthorized Practice of Law Committee a report detailing the findings of the investigation.

(2) The Chairman of the Unauthorized Practice of Law Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused in writing or otherwise; or (3) send a Letter of Notice to the accused party.

(3) If a Letter of Notice is sent to the accused individual or corporation, it shall be by registered mail and shall direct that a response be made within fifteen (15) days of receipt of the Letter of Notice.

(4) If a timely response to a Letter of Notice is made, the Chairman shall direct the Counsel to conduct further investigation or to terminate the investigation and place the item on the agenda for the next forthcoming Unauthorized Practice of Law Committee meeting.

(5) If, after the expiration of fifteen (15) days from the date of the receipt of the Letter of Notice, the individual or corporation has failed or refused to respond or has given a response that is insufficient to resolve the matter, the Chairman may direct Counsel to proceed to seek injunctive relief to enjoin such unauthorized practice pursuant to G.S. 84-37 or direct Counsel to notify the District Attorney of the Judicial District wherein the accused individual or corporation resides to bring injunctive or criminal proceedings against that individual or corporation pursuant to G.S. 84-7 et seq.

§ 10. Preliminary Hearing.

At the regular quarterly meeting of the Unauthorized Practice of Law Committee, the Committee shall consider all matters presented to it by Counsel and shall determine whether or not probable cause exists in each matter tending to establish that a person, firm or corporation is engaged in the unauthorized practice of law in North Carolina.

If no probable cause is found, the Committee shall recommend to the Council that the matter be dismissed. If probable cause is found the Committee shall then recommend to the Council that the matter be prosecuted in the General Court of Justice as by law provided.

i. Positive Action Committee of not less than seven members, one of whom shall be designated as Chairman and one as Vice-Chairman, for the purpose of implementing a program of intervention for lawyers with a substance abuse

problem which affects their professional conduct; provided, no member of the Grievance Committee shall be a member of the Positive Action Committee. Such Committee's creation shall in no wise be construed so as to hinder, limit or otherwise affect the disciplinary process, but such Committee, under such rules and procedures as the Council shall promulgate, shall function and exist as follows:

(1) Have jurisdiction to investigate and evaluate allegations of substance abuse by lawyers, which specifically includes, but is not limited to, conferring with any lawyer who is the subject of such allegations as to such allegations, and making recommendations to such lawyer, should it be determined that he or she in fact has a substance abuse problem, of sources of help for such problem;

(2) Perform similar functions as to cases referred to it by a disciplinary body, reporting the results thereof to the referring body.

(3) Except as noted herein and otherwise required by law, results of investigations, conferences and the like shall be privileged and held in the strictest confidence between the lawyer involved and the Committee. For good cause shown where the allegation of substance abuse is made by the lawyer's family, the Committee may, in its discretion, release such information to such person or persons as in its judgment will be in the best interest of the lawyer involved;

(4) Should such investigation and evaluation clearly indicate that the lawyer involved is engaging in conduct detrimental to the public, the courts, or the legal profession, the Committee shall take action, including, if warranted, filing of a grievance, as may appear appropriate to the Committee.

(5) The Committee may, under appropriate rules and regulations promulgated by the Council, establish district committees, which may exercise any or all of the functions set forth herein to the extent provided in any such rules and regulations.

j. There is created a standing committee for the disposition of funds received by the North Carolina State Bar from interest on trust accounts. This Committee shall carry out the provisions of the Plan for Disposition of Funds Received by the North Carolina State Bar from Interest on Trust Accounts. The Plan is:

I. Any funds remitted to the North Carolina State Bar from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to DR 9-102(C) shall be deposited by the North Carolina State Bar in a special account or accounts which shall be segregated from other funds of whatever nature received by the State Bar.

II. The funds received, and any interest, dividends, or other proceeds received thereafter with respect to these funds shall be used for programs concerned with improvement of the administration of justice, under the supervision and direction of the Board of Trustees established under this Plan to administer the funds.

III. The programs for which the funds may be utilized shall consist of: (a) providing legal services to indigents; (b) establishment and maintenance of lawyer referral systems in order to assure that persons in need of legal services can obtain such services from a qualified attorney; (c) enhancement and improvement of grievance and disciplinary procedures to protect the public more fully from incompetent or unethical attorneys; (d) development of a client security fund to protect the public from loss due to dishonest or fraudulent practices on the part of lawyers; (e) development and maintenance of a fund for student loans to enable meritorious persons to obtain a legal education when otherwise they would not have adequate funds for this purpose; and (f) such other programs designed to improve the administration of justice as may from time to time be proposed by the Board of Trustees and approved by the Supreme Court of North Carolina.

IV. The Board of Trustees shall consist of nine members appointed by the Council of the North Carolina State Bar on an annual basis. Members shall serve until their successor is appointed.

V. The Board of Trustees may grant, lend, or invest the funds received by the State Bar pursuant to DR 9-102(C) and funds may be employed to pay such administrative expenses as may be reasonably incurred in connection with the activities of the Board of Trustees. Grants or loans may be made by the Board of Trustees to such persons or entities as the Board of Trustees may consider appropriate in connection with implementing the programs being supported.

VI. If any provision of this Plan or the application thereof is held invalid, the invalidity does not affect other provisions or application of the Plan which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Only Part of Section Set Out. — As the rest of this § 5 was not changed by the amendments, it is not set out.

Cross References. — For ethical consideration as to deposit of client funds in interest-bearing trust accounts, see EC 9-6 of the Code of Professional Responsibility. For disciplinary rule as to deposit of client funds in interest-bearing trust accounts, see DR 9-102 of the Code of Professional Responsibility.

Effect of Amendments. — The amendments approved by the Supreme Court Nov. 4, 1975 and Feb. 3, 1976, rewrote paragraph c of § 5.

The amendment approved by the Supreme Court Feb. 24, 1978, rewrote paragraph e of § 5.

The amendment adopted July 13, 1979, added paragraph i of § 5.

The amendment adopted April 8, 1983, added paragraph j of § 5.

ARTICLE IX.

Discipline and Disbarment of Attorneys.

Determination of Disability.

§ 1. General Provisions.

Discipline for misconduct is not intended as punishment for wrongdoing but is for the protection of the public, the courts and the legal profession. The fact that certain misconduct has remained unchallenged when done by others, when done at other times or that it has not been made the subject of disciplinary proceedings earlier, shall not be an excuse for any member of the Bar.

Effect of Amendments. — This Article was rewritten by amendments approved by the Supreme Court Nov. 4, 1975, and Feb. 3, 1976, and amended by amendments approved by the Supreme Court May 11, 1977, Feb. 24, 1978, and June 6, 1978.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 2. Proceeding for Discipline.

The procedure to discipline members of the Bar of this State shall be in accordance with the provisions hereinafter set forth.

District Bars shall not conduct separate proceedings to discipline members of the Bar but shall assist and cooperate with The North Carolina State Bar in reporting and investigating matters of alleged misconduct on the part of the members of The North Carolina State Bar.

§ 3. Definitions.

Subject to additional definitions contained in other provisions of this chapter, the following words and phrases, when used in this article, shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

(1) **Accused or Accused Attorney:** a member of The North Carolina State Bar who has been accused of misconduct or whose conduct is under investigation, but as to which conduct there has not yet been a determination of whether probable cause exists.

(2) **Appellate Division:** The Appellate Division of the General Court of Justice.

(3) **Certificate of Conviction:** the certified copy of any judgment wherein a member of The North Carolina State Bar is convicted of a criminal offense, forwarded to the Secretary-Treasurer by the clerk of any state or federal court.

(4) **Chairman of the Grievance Committee:** councilor appointed to serve as chairman of the Grievance Committee of The North Carolina State Bar.

(5) **Commission:** The Disciplinary Hearing Commission of The North Carolina State Bar.

(6) **Commission Chairman:** the Chairman of the Hearing Commission of The North Carolina State Bar.

(7) **Complainant or Complaining Witness:** any person who has complained of the conduct of any member of The North Carolina State Bar to any officer or agency of The North Carolina State Bar.

(8) **Complaint:** a formal pleading filed in the name of The North Carolina State Bar with the Commission Chairman against a member of The North Carolina State Bar after a finding of probable cause.

(9) **Council:** the Council of The North Carolina State Bar.

(10) **Councilor:** a member of The Council of The North Carolina State Bar.

(11) **Counsel:** the Counsel of The North Carolina State Bar appointed by the Council.

(12) **Court or Courts of This State:** a court authorized and established by the Constitution or laws of the State of North Carolina.

(13) **Defendant:** a member of The North Carolina State Bar against whom a complaint is filed after a finding of probable cause.

(14) **Disabled or Disability:** condition of mental or physical incapacity interfering with the professional judgment or competence of an attorney; habitual intemperance; or the wilful and persistent failure to perform professional duties.

(15) **Grievance:** alleged misconduct.

(16) **Grievance Committee:** the Grievance Committee of The North Carolina State Bar.

(17) **Hearing Committee:** a hearing committee designated under § 14(4).

(18) **Incapacity or Incapacitated:** condition determined in a judicial proceeding under the laws of this or any other jurisdiction that an attorney is mentally defective, an inebriate, mentally disordered, or incompetent from want of understanding to manage his or her own affairs by reason of the excessive use of intoxicants, drugs, or other cause.

(19) **Investigation:** the gathering of information with respect to alleged misconduct or disability or to reinstatement.

(20) **Investigator:** any person designated to assist in investigation of alleged misconduct or of reinstatement.

(21) **Letter of Caution:** communication from the Grievance Committee to an attorney stating that past conduct of the attorney, while not the basis for discipline, is not professionally acceptable or may be the basis for discipline if continued or repeated.

(22) Letter of Notice: a communication to an accused attorney setting forth the substance of a grievance.

(23) Office of the Counsel: the office and staff maintained by the Counsel of The North Carolina State Bar.

(24) Office of the Secretary: the office and staff maintained by the Secretary-Treasurer of The North Carolina State Bar.

(25) Party: after a complaint has been filed, The North Carolina State Bar as plaintiff and the accused attorney as defendant.

(26) Plaintiff: after a complaint has been filed, The North Carolina State Bar.

(27) Preliminary Hearing: hearing by the Grievance Committee to determine whether probable cause exists.

(28) Probable Cause: a finding by the Grievance Committee that there is reasonable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(29) Secretary: the Secretary-Treasurer of The North Carolina State Bar.

(30) Serious Crime: the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of, any felony, or any crime that involves bribery, embezzlement, false pretenses and cheats, fraud, interference with the judicial or political process, larceny, misappropriation of funds or property, overthrow of the government, perjury or wilful failure to file a tax return.

(31) Supreme Court: the Supreme Court of North Carolina.

(32) Consolidation of Cases: a hearing by a Hearing Committee of multiple charges, whether related or unrelated in substance, brought against one defendant.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, added subdivision (32).

§ 4. State Bar Council — Powers and Duties in Discipline and Disability Matters.

The Council of The North Carolina State Bar shall have the power and duty:

(1) To supervise and conduct discipline and incapacity or disability proceedings in accordance with the provisions hereinafter set forth.

(2) To appoint members of the Disciplinary Hearing Commission as provided by statute.

(3) To appoint a Counsel. The Counsel shall serve at the pleasure of the Council. The Counsel shall be a member of The North Carolina State Bar but shall not be permitted to engage in the private practice of law.

(4) To order the transfer of a member to inactive status when such member has been judicially declared incompetent or has been committed to institutional care voluntarily or involuntarily because of incompetence or disability.

(5) To accept the surrender of the license to practice law of any member of The North Carolina State Bar during the progress of disciplinary proceedings against the member and impose such conditions upon the acceptance as the Council deems appropriate.

(6) To review the report of any Hearing Committee upon a petition for reinstatement and make the final determination as to whether the license shall be restored.

CASE NOTES

Cited in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 5. Chairman of the Grievance Committee — Powers and Duties.

(A) The Chairman of the Grievance Committee shall have the power and duty:

(1) To supervise the activities of the Counsel.

(2) To recommend to the Grievance Committee that an investigation be initiated.

(3) To recommend to the Grievance Committee that a grievance be dismissed.

(4) To direct a Letter of Notice to an accused attorney.

(5) To issue, at the direction and in the name of the Grievance Committee, Letters of Caution or private reprimands to an accused attorney.

(6) To notify an accused attorney that a grievance has been dismissed, and to notify the complainant in accordance with § 21.

(7) To call meetings of the Grievance Committee for the purpose of holding preliminary hearings.

(8) To issue subpoenas in the name of The North Carolina State Bar or direct the Secretary to issue such subpoenas.

(9) To administer oaths or affirmations to witnesses.

(10) To file and verify complaints and petitions in the name of The North Carolina State Bar.

(B) The President, Vice-Chairman or senior Council member of the Grievance Committee shall perform the functions of the Chairman of the Grievance Committee in any matter when the Chairman is absent or disqualified.

Effect of Amendments. — The amendment approved by the Supreme Court Feb. 24, 1978, rewrote subdivision (A)(6).

§ 6. Grievance Committee — Powers and Duties.

The Grievance Committee shall have the power and duty:

(1) To direct the Council to investigate any alleged misconduct or disability of a member of The North Carolina State Bar coming to its attention.

(2) To hold preliminary hearings, find probable cause and direct that complaints be filed.

(3) To dismiss grievances upon a finding of no probable cause.

(4) To issue a Letter of Caution to an accused attorney in cases wherein misconduct is not established but the activities of the accused attorney are deemed to be improper or may become the basis for discipline if continued or repeated.

(5) To issue a private reprimand to an accused attorney in cases wherein minor misconduct is established.

(6) To direct that petitions be filed seeking a determination whether a member of The North Carolina State Bar is disabled from continuing the practice of law by reason of mental infirmity or illness or because of addiction to drugs or intoxicants.

§ 7. Counsel — Powers and Duties.

The Counsel shall have the power and duty:

(1) To investigate all matters involving alleged misconduct whether initiated by the filing of grievance or otherwise.

(2) To recommend to the Chairman of the Grievance Committee that a matter be dismissed because the grievance is frivolous or falls outside the Council's jurisdiction; that a Letter of Caution or private reprimand be issued; or that the matter be passed upon the Grievance Committee to determine whether probable cause exists.

(3) To prosecute all disciplinary proceedings before the Grievance Committee, Hearing Committees and the courts.

(4) To represent The North Carolina State Bar in any trial, hearing or other proceeding concerned with the alleged disability of a member due to mental infirmity, illness, or addiction to drugs or intoxicants.

(5) To appear on behalf of The North Carolina State Bar at hearings conducted by Grievance Committee, Hearing Committees, or any other agency or court concerning any motion or other matter arising out of a disciplinary or disability proceeding.

(6) To appear at hearings conducted with respect to petitions for reinstatement or restoration of license by suspended or disbarred attorneys, to cross-examine witnesses testifying in support of the petition and to present evidence, if any, in opposition to the petition.

(7) To employ assistant counsel, investigators and other administrative personnel in such numbers as the Council may from time to time authorize.

(8) To maintain permanent records of all matters processed and the disposition of such matters.

(9) To perform such other duties as the Council may from time to time direct.

CASE NOTES

Cited in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 8. Chairman of the Hearing Commission — Powers and Duties.

(A) The Chairman of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the power and duty:

(1) To receive complaints alleging misconduct and petitions alleging the disability of a member filed by the Grievance Committee and petitions requesting reinstatement or restoration of license by members of The North Carolina State Bar who have been involuntarily transferred to inactive status, suspended or disbarred.

(2) To assign three members of the Commission, consisting of two members of The North Carolina State Bar and one layman, to hear such complaint or petition. The chairman shall designate one of the attorney members as chairman of the Hearing Committee. Provided: that no member shall be appointed to serve on any committee reviewing a petition for reinstatement in a case wherein that member served on the Hearing Committee that originally ordered the discipline or transfer to inactive status. The Chairman of the Hearing Commission may designate himself to serve as one of the attorney members of any Hearing Committee and shall be chairman of any Hearing Committee on which he serves.

(3) To set the time and place for the hearing on each complaint or petition.

(4) To subpoena witnesses and compel their attendance, and to compel the production of books, papers, and other documents deemed necessary or material to any hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) To file findings, conclusions and orders of the Hearing Committees with the Secretary.

(6) In his discretion to consolidate for hearing two or more cases in which a subsequent complaint or complaints have been served upon a defendant within ninety days of the date of service of the first or a preceding complaint.

(7) To prepare and issue letters of private reprimand.

(B) The Vice-Chairman of the Disciplinary Hearing Commission shall perform the function of the Chairman in any matter when the Chairman is absent or disqualified.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, added subdivision (A)(6). The amendment approved Feb. 24, 1978, added subdivision (A)(7).

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 9. Hearing Committee — Powers and Duties.

Hearing Committees of the Disciplinary Hearing Commission of The North Carolina State Bar shall have the following powers and duties:

(1) To hold hearings on complaints alleging misconduct and petitions seeking a determination of disability or reinstatement.

(2) To enter orders regarding discovery and other procedures in connection with such hearings, including, in disability matters, the examination of a member by such qualified medical experts as the Committee shall designate.

(3) To subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Subpoenas shall be issued by the chairman of the Hearing Committee in the name of the Disciplinary Hearing Commission of The North Carolina State Bar. The chairman may direct the Secretary to issue such subpoenas.

(4) To administer oaths or affirmations to witnesses at hearings.

(5) To make findings of fact and conclusions of law.

(6) To enter orders dismissing complaints in matters before the Committee.

(7) To enter orders of discipline against attorneys in matters before the Committee.

(8) To tax costs of the disciplinary procedures against any defendant against whom discipline is imposed: Provided, however, that such costs shall not include the compensation of any member of the Council, committees or agencies of The North Carolina State Bar.

(9) To enter orders transferring a member to inactive status on the ground of incapacity or disability to continue the practice of law.

(10) To report to the Council its findings of fact and recommendations after hearings on petitions for reinstatement or restoration of license by members previously transferred to inactive status by a Hearing Committee or the Council, suspended, or disbarred.

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 10. Secretary — Powers and Duties in Discipline and Disability Matters.

The Secretary shall have the following powers and duties in regard to discipline and disability procedures:

(1) To receive complaints for transmittal to the Counsel.

(2) To issue summons and subpoenas when so directed by the President, the Chairman of the Grievance Committee, the Chairman of the Disciplinary Hearing Commission, or the Chairman of any Hearing Committee.

(3) To maintain a record and file of all grievances not dismissed as frivolous or determined to be outside the jurisdiction of The North Carolina State Bar by the Grievance Committee.

§ 11. Grievances — Form and Filing.

(a) A grievance may be filed by any person against a member of The North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the Counsel. The Counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. Such standard forms shall be available in the Office of the Counsel, the Office of the Secretary, and the offices of the several clerks of court in this State. Grievances reduced to writing on such standard form shall be transmitted by the complainant to the Office of the Secretary.

(2) Upon the direction of the Council or the Grievance Committee the Counsel shall undertake the investigation of such conduct of any member of The North Carolina State Bar as may be specified by the Council or Grievance Committee.

(3) The Counsel may undertake an investigation of any matter coming to the attention of the Counsel involving alleged misconduct of a member of The North Carolina State Bar: Provided that such investigation has been authorized by the Chairman of the Grievance Committee.

§ 12. Investigation; Initial Determination.

(1) Subject to the policy supervision of the Council and the control of the Chairman of the Grievance Committee, the Counsel, or other personnel under the authority of the Counsel, shall make such investigation of the grievance as may be appropriate and submit to the Chairman of the Grievance Committee a report detailing the findings of the investigation.

(2) Within fifteen days of the receipt of the initial or any interim report of the Counsel concerning any grievance, the Chairman of the Grievance Committee may: (1) treat the report as a final report and advise the Counsel to discontinue investigation; (2) direct the Counsel to conduct further investigation, including contact with the accused attorney in writing or otherwise; or (3) send a Letter of Notice to the accused attorney.

(3) If a Letter of Notice is sent to the accused attorney, it shall be by registered or certified mail and shall direct that a response be made within fifteen days of receipt of the Letter of Notice. Such response shall be in a full and fair disclosure of all the facts and circumstances pertaining to the alleged misconduct.

(4) If a timely response to a Letter of Notice is made, the Chairman of the Grievance Committee shall direct the Counsel to conduct further investigation or shall terminate the investigation and so inform the Counsel.

(5) If, after the expiration of fifteen days from the date of receipt of a Letter of Notice, the accused attorney has failed or refused to respond or has given a response that is insufficient to resolve the grievance, the Chairman of the Grievance Committee may examine witnesses, including the accused, under oath and issue subpoenas to compel their attendance, and compel the production of books, papers, and other documents or writings deemed necessary or material to the inquiry. Each subpoena shall be issued by the Chairman of the Grievance Committee, or by the Secretary at the direction of the Chairman. The Counsel may examine such witnesses under oath or otherwise.

(6) Within forty-five days of the receipt of the final report of the Counsel, or the termination of an investigation, the Chairman shall convene the Grievance Committee for a preliminary hearing or seek approval of the Committee of the dismissal of the grievance.

(7) Neither the unwillingness nor neglect of the complainant to sign a grievance, nor settlement, compromise or restitution shall, in itself, justify abatement of an investigation into the conduct of an attorney.

Effect of Amendments. — The order adopted July 15, 1983, inserted "or certified" in the first sentence of subdivision (3).

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 13. Preliminary Hearing.

(1) The Grievance Committee shall determine whether there is probable cause to believe that a member of The North Carolina State Bar is guilty of misconduct justifying disciplinary action.

(2) The Chairman of the Grievance Committee shall have the power to administer oaths and affirmations.

(3) The Chairman shall keep a record of the number of members concurring in the finding of every grievance and shall file the record with the Secretary, but the record shall not be made public except on order of the Council.

(4) The Chairman shall have the power to subpoena witnesses and compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The Chairman may designate the Secretary to issue such subpoenas.

(5) The Counsel, and assistant counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the Committee is in session, and deliberating, but no persons other than members may be present while the Committee is voting.

(6) Disclosure of matters occurring before the Committee other than its deliberations and the vote of any member may be made to the Counsel or the Secretary for use in the performance of their duties. Otherwise a member, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Committee only when so directed by a court of record preliminarily to or in connection with a judicial proceeding.

(7) At any preliminary hearing held by the Grievance Committee, a quorum of two thirds of the members shall be required to conduct any business. Affirmative vote of a majority of members present shall be necessary for a finding that probable cause exists. The Chairman shall not be counted for quorum purposes and shall be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(8) If probable cause is found, the Chairman shall direct the Counsel to prepare and file a complaint against the accused attorney. If no probable cause is found the grievance shall be dismissed.

(9) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the accused attorney is not in accord with accepted professional practice, or may be the subject of discipline if continued or repeated, the Committee may issue a Letter of Caution to the accused attorney. A record of such Letter of Caution shall be maintained in the Office of the Secretary.

(10) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the Committee may issue a private reprimand to the accused attorney. A record of such private reprimand shall be maintained in the Office of the Secretary, and a copy of the private reprimand shall be served upon the accused attorney as provided in G.S. 1A-1, Rule 4. Within fifteen days after service the accused attorney may refuse the private reprimand and request that charges be filed. Such refusal and request shall be addressed to the Grievance Committee and filed with the Secretary. The Counsel shall thereafter prepare and file a complaint against the accused attorney.

(11) Formal complaints shall be issued in the name of The North Carolina State Bar as plaintiff, signed or verified by the Chairman of the Grievance Committee.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, inserted "and deliberating" near the end of subsection (5).

The amendment approved February 24, 1978, rewrote subsection (10).

CASE NOTES

Cited in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

§ 14. Formal Hearing.

(1) Complaints shall be filed in the Office of the Secretary. The Secretary shall cause a summons and a copy of the complaint to be served upon the defendant attorney and thereafter a copy of the complaint shall be delivered to the Chairman of the Disciplinary Hearing Commission, informing the Chairman of the date service on the defendant was effected.

(2) Service of complaints and other documents or papers shall be accomplished as set forth in G.S. 1A-1, Rule 4.

(3) Complaints in disciplinary actions shall set forth the charges with sufficient precision to clearly apprise the defendant attorney of the conduct which is the subject of the complaint.

(4) Within seven days of return of service of a complaint, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for

the hearing to commence. The commencement of the hearing shall be scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the defendant.

(5) Within twenty days after the service of the complaint, unless further time is allowed by the Chairman upon good cause shown, the defendant shall file an answer to the complaint with the Secretary and shall deliver a copy to the Counsel.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the defendant's default and in such case the allegations contained in the complaint shall be deemed to be admitted. The Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate.

(7) Discovery shall be available to the parties in accordance with the North Carolina Rules of Civil Procedure, G.S. 1A-1, Rules 26-37. Any discovery undertaken must be completed before the date scheduled for commencement of the hearing unless the time for discovery is extended, for good cause shown, by the Chairman. The Chairman may thereupon reset the time for the hearing to commence to accommodate completion of reasonable discovery.

(8) In order to provide opportunity for the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties for such purposes may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest may permit. Any settlement or compromise of any issue in the case shall be subject to the approval of the Hearing Committee.

(9) At the discretion of the Chairman of the Hearing Committee a conference may be ordered prior to the date set for commencement of the hearing, and upon five days' notice to the parties, for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings. Such conference may be held before any member of the Committee designated by its Chairman. At any prehearing or other conferences which may be held to expedite the orderly conduct and disposition of any hearing, there may be considered, in addition to any offers of settlement or proposals of adjustment, the possibility of the following:

(a) The simplification of the issues.

(b) The exchange and acceptance of service of exhibits proposed to be offered in evidence.

(c) The obtaining of admission as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(d) The limitation of the number of witnesses.

(e) The discovery of production of data.

(f) Such other matters as may properly be dealt with to aid in expediting the orderly conduct and disposition of the proceeding.

(9.1) The Chairman of the Hearing Committee may hear and dispose of all pretrial motions excepting only motions the granting of which would result in continuance or dismissal of the charges or final judgment for either party.

(10) The initial hearing date as set by the Chairman in accordance with subsection (4) of this section may be reset by the Chairman pursuant to subsections (5) and (7) of this section, and said initial hearing or reset hearing may be continued by the Hearing Committee for a period not to exceed thirty days, for good cause shown.

(11) Unless necessary to afford the accused due process, no more than one continuance of a hearing and no more than one extension of time for filing of pleadings shall be granted. No continuance of any hearing other than adjournment from day to day shall be granted by a Hearing Committee after the hearing has commenced, except for reasons that would work an extreme hardship in the absence of a continuance; provided further the Chairman of the Disciplinary Hearing Commission may continue a hearing on his own motion, or by motion of either party, in order to await the filing of a controlling decision of an appellate court.

(12) The defendant shall appear in person before the Hearing Committee at the time and place named by the Chairman. The hearing shall be open except that for good cause shown the Chairman of the Hearing Committee may exclude from the hearing room all persons except the parties, Counsel, and those engaged in the hearing. No hearing shall be closed to the public over the objection of the defendant. The defendant shall, except as otherwise provided by law, be competent and compellable to give evidence in behalf of either of the parties. The defendant may be represented by Counsel, who shall enter an appearance. Pleadings and proceedings before a Hearing Committee shall conform as nearly as is practicable with requirements of the Rules of Civil Procedure and for trials of non-jury civil causes in the Superior Courts except as otherwise provided hereunder.

(13) Pleadings or other documents in formal proceedings required or permitted to be filed under these rules must be received for filing at the Office of the Secretary within the time limits, if any, for such filing. The date of receipt by the Office of the Secretary and not the date of deposit in the mails is determinative.

(14) When a defendant appears in his own behalf in a hearing he shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, an address at which any notice or other written communication required to be served upon him may be sent, if such address differs from that last reported to the Secretary by the defendant.

(15) When a defendant is represented by Counsel in a hearing, Counsel shall file with the Office of the Secretary, with proof of delivery of a copy to the Counsel, a written notice of such appearance which shall state his name, address and telephone number, the name and address of the defendant on whose behalf he appears, and the caption and docket number of the proceeding. Any additional notice or other written communication required to be served on or furnished to a defendant during the pendency of the hearing may be sent to the Counsel of record for such defendant at the stated address of the Counsel in lieu of transmission to the defendant.

(16) The Hearing Committee shall have the power to subpoena witnesses and compel their attendance, and to compel the production of books, papers and other documents deemed necessary or material to any hearing. Such process shall be issued in the name of the Committee by its Chairman, or the Chairman may designate the Secretary of The North Carolina State Bar to issue such process. The defendant shall have the right to invoke the powers of the Committee with respect to compulsory process for witnesses and for the production of books, papers, and other writings and documents.

(17) In any hearing admissibility of evidence shall be governed by the rules of evidence applicable in the Superior Court of the State at the time of the hearing. The Chairman of the Hearing Committee shall rule on the admissibility of evidence, subject to the right of any member of the Hearing Committee to question his ruling and, in the event of such question, the entire Hearing Committee shall then rule on the matter of evidence in question.

(18) If the Hearing Committee finds that the charges of misconduct are not established by the greater weight of the evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of

misconduct are established by the greater weight of the evidence, the Hearing Committee shall enter an order for discipline. In either instance the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law and which shall be accompanied by a certified transcript of the testimony, all pleadings, exhibits and briefs.

(19) If the charges of misconduct are established, the Hearing Committee shall then consider any evidence relevant to the discipline to be imposed, including the record of all previous misconduct for which the defendant has been disciplined in this State or any other jurisdiction and any evidence in mitigation of the offense. A summary of this evidence shall accompany the transcript of the hearing.

(20) All reports and orders shall be signed by the members of the Hearing Committee and shall be filed with the Secretary. Copies of all reports and orders shall be delivered to the parties. The copy to the defendant shall be served as provided in G.S. 1A-1, Rule 4.

(21) In all hearings conducted pursuant to this section, a complete record shall be made of evidence received during the course of the hearing. Such transcript shall be made in the form and by means authorized for civil trials in the courts of this State.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, inserted "of service" and "on the defendant" in the first sentence, "initially" near the beginning of the fourth sentence and added at the end of the fourth sentence the language beginning "unless one or more subsequent complaints" in the first paragraph of subsection (4), added the second paragraph of subsection (4), rewrote subsection (10), added the language beginning "except for reasons" at the end of the third sentence of subsection (11) and inserted "consider" near the beginning of the first sentence and "accompany" in the last sentence of subsection (19).

The amendment approved June 6, 1978, inserted "return of" near the beginning of the first sentence of subdivision (4), inserted "Chairman of the" near the beginning of subdivision (9), added subdivision (9.1), deleted "beyond the control of a party" following "reasons" near the end of the second sentence of subdivision (11), added the proviso at the end of subdivision (11), inserted "Chairman of the" near the beginning of the second sentence of subdivision (17) and added to that sentence the language beginning "subject to the right," and rewrote the third sentence of subdivision (18).

CASE NOTES

Applied in North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981).

Cited in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

§ 15. Effect of a Finding of Guilt in Any Criminal Case.

(1) Any member of The North Carolina State Bar convicted of a serious crime in any state or federal court, whether such a conviction results from a plea of guilty or nolo contendere or from a verdict after trial, shall, upon the conviction becoming final by affirmation on appeal or expiration of the time within which to perfect an appeal, an appeal not having been perfected, be suspended from the practice of law pending the disposition of any disciplinary proceeding in progress or commenced upon such conviction.

(2) A certificate of the conviction of an attorney for any crime shall be conclusive evidence of guilt of that crime in any disciplinary proceeding instituted against a member.

(3) Upon the receipt of a certificate of conviction of a member of a serious crime, the Grievance Committee will immediately authorize the filing of a complaint if one is not then pending. In the hearing on such complaint the sole issue to be determined will be the extent of the final discipline to be imposed:

Provided, that no hearing based solely upon a certificate of conviction will commence until all appeals from the conviction are concluded.

(4) Upon the receipt of certificate of conviction of a member for a crime not constituting a serious crime, the Grievance Committee will commence whatever action, including the filing of a complaint, it may deem appropriate.

§ 16. Reciprocal Discipline.

(1) Upon receipt of a certified copy of an order demonstrating that a member of The North Carolina State Bar has been disciplined in another jurisdiction, the Grievance Committee shall forthwith issue a notice directed to the accused attorney containing a copy of the order from the other jurisdiction, and an order directing that the accused attorney inform the Committee within 30 days from service of the notice, of any claim by the accused attorney that the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. This notice is to be served on the accused attorney in accordance with the provisions of G.S. 1A-1, Rule 4.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this State shall be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (1) above, the Grievance Committee shall impose the identical discipline unless the accused attorney demonstrates:

(a) That the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(b) There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not consistently with its duty accept as final the conclusion on that subject; or

(c) That the imposition of the same discipline would result in grave injustice; or

(d) That the misconduct established has been held to warrant substantially different discipline in this State.

Where the Grievance Committee determines that any of said elements exist, the Committee shall dismiss the case or direct that a complaint be filed.

(4) In all other respects, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct shall establish the misconduct for purposes of a disciplinary proceeding in this State.

§ 17. Surrender of License While Proceeding Pending.

(1) A member who is the subject of an investigation into allegations of misconduct on his part may tender his license to practice, but only by delivering to the Council an affidavit stating that he desires to resign and that:

(a) The resignation is freely and voluntarily rendered; is not the result of coercion or duress; and the member is fully aware of the implications of submitting the resignation;

(b) The member is aware that there is presently pending investigation or other proceedings regarding allegations that the member has been guilty of misconduct, the nature of which shall specifically be set forth;

(c) The member acknowledges that the material facts upon which the complaint is predicated are true; and

(d) The resignation is being submitted because the member knows that if charges were predicated upon the misconduct under investigation the member could not successfully defend against them.

(2) The Council may impose any conditions upon the acceptance of such resignation that it deems appropriate.

(3) Upon acceptance of the required affidavit, the Council shall enter an order suspending or disbarring the member on consent.

(4) The order suspending or disbarring the member on consent shall be a matter of public record. However, the affidavit required under (1) above shall not be publicly disclosed or made available for use in any other proceeding except upon order of a court or the Council.

§ 18. Disability Hearings.

(1) Where a member of The North Carolina State Bar has been judicially declared incompetent or otherwise incapacitated or has been committed voluntarily or involuntarily to a hospital for the mentally disordered under the provisions of Chapter 122 of the General Statutes or similar laws of any jurisdiction, the Council, upon proper proof of the fact, shall enter an order transferring such member to inactive status effective immediately and for an indefinite period until the further order of the Council. A copy of such order shall be served upon such member, his guardian, or the director of the institution to which the member has been committed.

(2) When evidence has been obtained that a member of The North Carolina State Bar has become disabled, the Grievance Committee shall conduct a hearing in a manner that shall conform as nearly as is possible to the procedures set forth in § 13 of this Article. The Grievance Committee shall determine whether a petition alleging disability will be filed in the name of The North Carolina State Bar by the Chairman of the Grievance Committee.

(3) Whenever the Grievance Committee files a petition alleging the disability of a member, the Chairman of the Hearing Commission shall appoint a Hearing Committee as provided in §§ 8(A) (2) and 14 (4) to determine whether such member is disabled. The Hearing Committee shall conduct a hearing on the petition and receive whatever evidence it deems necessary or proper, including the examination of the member by such qualified medical experts as the Hearing Committee shall designate. If, upon due consideration of the matter, the Hearing Committee concludes that the member is disabled, it shall enter an order transferring the member to inactive status on the ground of such disability for an indefinite period and until the further order of the Council. Any hearing in a pending disciplinary proceeding against the member shall be held in abeyance. The Hearing Committee shall provide for such notice to the member of proceedings in the matter as it deems proper and advisable and may appoint an attorney to represent the member if he or she is without adequate representation.

(4) In any proceeding seeking a transfer to inactive status under this section, the burden of proof shall be on the petitioner.

(5) If, during the course of a disciplinary proceeding, the defendant contends that he is suffering from a disability which makes it impossible for him to defend adequately, the proceeding shall be held in abeyance pending a determination by the Hearing Committee whether such disability exists. If the Hearing Committee concludes that such disability does exist, the disciplinary proceeding shall be held in abeyance until the Hearing Committee shall determine that such disability has been removed. If the Hearing Committee shall determine that the disability contended by the defendant is also one defined in § 3 (12) [§ 3 (14)], it shall proceed under the provisions of (3) above as if a petition alleging such disability had been filed by the Grievance Committee. If as a result of such proceeding, the defendant is transferred to inactive status, the disciplinary proceeding shall be held in abeyance as long as the defendant remains in inactive status. If thereafter the defendant is returned to active status by the Council and a Hearing Committee determines that he is able to defend adequately, it may resume the disciplinary proceeding.

§ 19. Enforcement of Powers.

In proceedings before any committee, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey an order in aid of discovery, or refuses to obey any lawful order of the committee contained in its decision rendered after hearing the Counsel or Secretary may apply to the appropriate court for an order directing that person to take the requisite action.

§ 20. Notice to Accused of Action and Dismissal.

In every disciplinary case wherein the accused attorney has received a Letter of Notice, and the grievance has been dismissed, the accused attorney shall be notified of the dismissal by letter by the Chairman of the Grievance Committee. The Chairman shall have discretion to give similar notice to the accused attorney in cases wherein a Letter of Notice has not been issued but the Chairman deems such notice to be appropriate.

§ 21. Notice to Complainant.

(1) If the Grievance Committee finds probable cause, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and has been referred to the Disciplinary Hearing Commission for hearing.

(2) If final action on a grievance is taken by the Grievance Committee in the form of a Letter of Caution, or a private reprimand, the Chairman of the Grievance Committee shall advise the complainant that the grievance has been received and considered and that final action has been taken thereon but that the result is confidential and may be disclosed only upon the order of a court. If final action on a grievance is a dismissal, complainant and accused attorney shall be so notified.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote this section.

§ 22. Appointment of Counsel to Protect Clients' Interests When Attorney Disappears, Dies or Is Transferred to Inactive Status Because of Disability.

(1) Whenever a member of The North Carolina State Bar has been transferred to inactive status because of incapacity or disability, or disappears, or dies, and no partner, personal representative or other party capable of conducting the attorney's affairs is known to exist, the Senior Resident Judge of the superior court in the district wherein is located the last address on the register of members, if it is in this State, shall be requested by the Secretary to appoint an attorney or attorneys to inventory the files of the inactive, disappeared or deceased member and to take such action as seems indicated to protect the interests of the inactive, disappeared or deceased member and his or her clients.

(2) Any member so appointed shall not be permitted to disclose any information contained in any files so inventoried without the consent of the client to whom such file relates except as necessary to carry out the order of the court which appointed the attorney to make such inventory, or to assume the representation of any such client.

§ 23. Imposition of Discipline; Finding of Incapacity or Disability; Notice to Courts.

(A) Upon the final determination of a disciplinary proceeding wherein discipline is imposed, one of the following actions shall be taken.

(1) *Reprimand.* A letter of reprimand shall be prepared by the Chairman of the Grievance Committee or the Chairman of the Disciplinary Hearing Commission, depending upon the agency ordering the reprimand. The letter of reprimand shall be served upon the accused attorney or defendant and a copy shall be filed with the Secretary, and shall be considered confidential.

(2) *Public Censure, Suspension or Disbarment.* The Chairman of the Disciplinary Hearing Commission shall file the order of public censure, suspension or disbarment with the Secretary. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disciplined member and filed with the Clerk of the Supreme Court of North Carolina. A judgment of suspension or disbarment shall be effective throughout the State.

(B) Upon the final determination of incapacity or disability the President of the Council or the Chairman of the Disciplinary Hearing Commission, depending upon the agency entering the order, shall file with the Secretary a copy of the order transferring the member to inactive status. The Secretary shall cause a certified copy of the order to be entered upon the judgment docket of the superior court of the county wherein is located the last address listed on the register of members by the disabled member and also upon the minutes of the Supreme Court of North Carolina.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, inserted "one of" in the introductory language of subsection (A).

The amendment approved February 24, 1978, rewrote subdivisions (1) and (2) of subsection (A).

The amendment approved by the Supreme Court June 6, 1978, inserted "one of" in the introductory language of subsection (A) and added "and shall be considered confidential" at the end of subdivision (1) of subsection (A).

§ 24. Notice to Clients of Disbarred or Suspended Attorneys.

(1) A disbarred or suspended member of The North Carolina State Bar shall promptly notify by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment or suspension and consequent inability of the member to act as an attorney after the effective date of disbarment or suspension and shall advise such clients to seek legal advice elsewhere.

(2) A disbarred or suspended member shall promptly notify, or cause to be notified by registered or certified mail, return receipt requested, each client who is involved in pending litigation or administrative proceedings, and the attorney or attorneys for each adverse party in such matter or proceeding of the disbarment or suspension and consequent inability to act as an attorney after the effective date of the disbarment or suspension. The notice to be given to the client shall recommend the prompt substitution of another attorney or attorneys in the case.

In the event the client does not obtain substitute counsel before the effective date of the disbarment or suspension, it shall be the responsibility of the disbarred or suspended member to move in the court or agency in which the proceeding is pending for leave to withdraw.

The notice to be given to the attorney or attorneys for an adverse party shall state the place of residence of the client of the disbarred or suspended attorney.

(3) Orders imposing suspension or disbarment shall be effective thirty days after being served upon the defendant. The disbarred or suspended attorney, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date the member may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4) Within ten days after the effective date of the disbarment or suspension order, the disbarred or suspended attorney shall file with the Secretary an affidavit showing that he or she has fully complied with the provisions of the order and with the provisions of this section, and all other state, federal and administrative jurisdictions to which he or she is admitted to practice. Such affidavit shall also set forth the residence or other address of the disbarred or suspended member to which communications may thereafter be directed.

(5) The disbarred or suspended member shall keep and maintain records of the various steps taken under this section so that, upon any subsequent proceeding, proof of compliance with this section and with the disbarment or suspension order will be available. Proof of compliance with this section shall be a condition precedent to any petition for reinstatement.

§ 25. Reinstatement.

(A) After suspension or disbarment:

(1) No member of The North Carolina State Bar suspended or disbarred may resume practice until reinstated by order of the Council.

(2) A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least three years from the effective date of the disbarment.

(3) Petitions for reinstatement by disbarred attorneys shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall within seven (7) days appoint a Hearing Committee as provided in § 8 (A) (2), schedule a time and place for the hearing, and notify the Council and the petitioner of the composition of the Hearing Committee and the time and place for the hearing. The petitioner shall have the burden of demonstrating by clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(4) Petitions for reinstatement by suspended attorneys shall be filed with the Secretary. Upon receipt of the petition, the Secretary shall refer the petition to the Council. The Council shall make such inquiry into the matter as it deems necessary. The Council may refer the petition to the Disciplinary Hearing Commission for hearing as set forth in subsection (3) of this section.

(5) In all proceedings upon a petition for reinstatement, cross-examination of the petitioner's witnesses and the submission of evidence, if any, in opposition to the petition shall be conducted by the Counsel.

(6) The Council in its discretion may direct that the necessary expenses incurred in the investigation and processing of a petition for reinstatement be paid by the petitioner.

(B) After transfer to inactive status because of disability:

(1) No member of The North Carolina State Bar transferred to inactive status because of incapacity or disability may resume active status until reinstated by order of the Council. Any member transferred to inactive status because of incapacity or disability shall be entitled to apply for reinstatement to active status once a year or at such shorter intervals as is stated in the order transferring the member to inactive status or any modification thereof.

(2) Petitions for reinstatement by members transferred to inactive status because of disability shall be filed with the Secretary. Upon receipt of the petition the Secretary shall refer the petition to the Chairman of the Disciplinary Hearing Commission. The Chairman shall appoint a Hearing Committee as provided in §§ 8 (A) (2) and 14 (4). The Hearing Committee shall promptly schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that the disability has been removed and the petitioner is fit to resume the practice of law. Upon such petition the Hearing Committee may take or direct such action as it deems necessary or proper to a determination of whether the disability has been removed, including a direction for an examination of the petitioner by such qualified medical experts as the Hearing Committee shall designate. In its discretion, the Hearing Committee may direct that the expense of such an examination shall be paid by the petitioner. At the conclusion of the hearing, the Hearing Committee shall promptly file a report containing its findings and recommendations and transmit them together with the record, to the Council. The Council shall review the report of the Hearing Committee and the record, and determine whether, and upon what conditions, the petitioner shall be reinstated.

(3) Where a member has been transferred to inactive status by an order of the Council based on incapacity as defined in § 3 (17) [§ 3 (18)] or after commitment on the grounds of incompetency and thereafter, in proceedings duly taken, the member has been judicially declared to be competent or the incapacity has been removed, the Council may dispense with further evidence that the incapacity has been removed and may direct his or her reinstatement to active status upon such terms as are deemed proper and advisable.

(4) The filing of a petition for reinstatement to active status by a member of The North Carolina State Bar transferred to inactive status because of disability shall be deemed to constitute a waiver of any doctor-patient privilege with respect to any treatment of the attorney during the period of the disability. The petitioner shall be required to disclose the name of every psychiatrist, psychologist, physician and hospital or other institution by whom or in which the petitioner has been examined or treated since transfer to inactive status and shall furnish to the Secretary written consent to each to divulge such information and records as requested by the Counsel or a Hearing Committee.

Effect of Amendments. — The amendment approved by the Supreme Court May 11, 1977, rewrote the third and fourth sentences of subdivision A (3).

§ 26. Address of Record.

Except where otherwise specified, any provision herein for notice to an accused attorney or a defendant shall be deemed satisfied by appropriate correspondence addressed to that attorney by registered mail at the last address entered in the register of members provided for in Article II, § 1 of these rules.

§ 27. Disqualification Due to Interest.

No member of the Council or Hearing Commission shall participate in any disciplinary matter involving such member, any partner or associate in the practice of law of such member, or in which such member has a personal interest.

§ 28. Trust Accounts; Audit.

(1) Any bank account maintained by a member to comply with the Code of Professional Responsibility of The North Carolina State Bar is, and shall be clearly labeled and designated as, a trust account. Any safe deposit box used in connection with the practice of law in North Carolina maintained by a member of The North Carolina State Bar to comply with the Code of Professional Responsibility shall be located in this State (unless the client otherwise consents in writing) and the member shall advise any institution in which such deposit box is located that the contents of the same may include property of clients.

(2) A member of The North Carolina State Bar shall preserve, or cause to be preserved, the records of all bank accounts or other records pertaining to the funds or property of a client maintained by the member in compliance with the Code of Professional Responsibility for a period of not less than six years subsequent to the last transaction pertaining to the same or subsequent to the final conclusion of the representation of a client relative to such funds or property, whichever shall last occur. Such records shall include checkbooks, cancelled checks, check stubs, vouchers, ledgers, and journals, closing statements, accountings or other statements of disbursement rendered to clients or other parties with regard to trust funds, or similar equivalent records clearly and expressly reflecting the date, amount, source and reason for all receipts, withdrawals, deliveries and disbursements of the funds or property of a client. All of such records shall be kept as a specific prerequisite to the right to receive, deliver and disburse funds or property of a client, and shall have a public aspect relating to the protection of clients and to fitness of the member to practice law. In any instance of an alleged violation by the member of any Disciplinary Rule of the Code of Professional Responsibility or of other misconduct such records, insofar as they may relate in any way to the transaction, occurrence or client in question, shall be produced by the member for inspection, audit and copying by the Counsel upon the direction of the Chairman of the Grievance Committee or of a Hearing Committee. Such records or copies thereof shall be admissible in evidence in any disciplinary proceeding. Provided: that notice of such intended use shall be given to any client involved, if practicable, unless such client is already aware of such intended use, and, upon good cause shown by such client, the admission of the same shall be under such conditions as shall be reasonably calculated thereafter to protect the confidences of such client in the event that the proceedings otherwise become public records. Permissible means of protection shall not prejudice the accused attorney or defendant and may include, but are not limited to, excision, in camera production, retention in sealed envelopes, or similar devices. Failure to maintain such records or produce them upon such direction shall constitute grounds for disciplinary action without regard to any other matter. The cost of any audit or investigation necessitated by such failure may be taxed against the member.

§ 29. Confidentiality.

All proceedings involving allegations of misconduct by or disability of an attorney shall be kept confidential except as provided in § 14 (12) of this article or unless and until (1) there is entered a final order for the imposition of public discipline, (2) the accused attorney or defendant requests that the matter be public, or (3) the investigation is predicated upon a conviction of the accused attorney or defendant for a crime. In matters involving alleged disability, all proceedings shall be kept confidential unless and until the Council or Hearing Committee enters an order transferring the member to inactive status.

This provision shall not be construed to deny access to relevant information to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or to law-enforcement agencies investigating qualifications for government employment. In addition, the Secretary shall transmit notice of all public discipline imposed, or transfer to inactive status due to disability, to the National Discipline Data Bank maintained by the American Bar Association.

Appendix VII. Code of Professional Responsibility of The North Carolina State Bar

PREAMBLE AND PRELIMINARY STATEMENT.

CANON 1. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

Ethical Considerations.
Disciplinary Rules.
DR 1-101 Maintaining Integrity and Competence of the Legal Profession.
DR 1-102 Misconduct.
DR 1-103 Disclosure of Information to Authorities.

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

Ethical Considerations.
Recognition of Legal Problems.
Selection of a Lawyer: Generally.
Selection of a Lawyer: Lawyer Advertising.
Financial Ability to Employ Counsel:
Persons Able to Pay Reasonable Fees.
Financial Ability to Employ Counsel:
Persons Unable to Pay Reasonable Fees.
Acceptance and Retention of Employment.
Disciplinary Rules.
DR 2-101 Publicity.
DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.
DR 2-103 Recommendation of Professional Employment.
DR 2-104 Suggestion of Need of Legal Services.
DR 2-105 Designation of Areas of Practice.
DR 2-106 Fees for Legal Services.
DR 2-107 Division of Fees among Lawyers.
DR 2-108 Agreements Restricting the Practice of a Lawyer.
DR 2-109 Acceptance of Employment.
DR 2-110 Withdrawal from Employment.

CANON 3. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORIZED PRACTICE OF LAW.

Ethical Considerations.
Disciplinary Rules.
DR 3-101 Aiding Unauthorized Practice of Law.
DR 3-102 Dividing Legal Fees with a Non-Lawyer.
DR 3-103 Forming a Partnership with a Non-Lawyer.

CANON 4. A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.

Ethical Considerations.
Disciplinary Rules.
DR 4-101 Preservation of Confidences and Secrets of a Client.

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

Ethical Considerations.
Interests of a Lawyer That May Affect His Judgment.
Interests of Multiple Clients.
Desires of Third Persons.

Disciplinary Rules.
DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.
DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.
DR 5-103 Avoiding Acquisition of Interest in Litigation.
DR 5-104 Limiting Business Relations with a Client.
DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
DR 5-106 Settling Similar Claims of Clients.
DR 5-107 Avoiding Influence by Others Than the Client.

CANON 6. A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY.

Ethical Considerations.
Disciplinary Rules.
DR 6-101 Failing to Act Competently.
DR 6-102 Limiting Liability to Client.

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

Ethical Considerations.
Duty of the Lawyer to a Client.
Duty of the Lawyer to the Adversary System of Justice.
Disciplinary Rules.
DR 7-101 Representing a Client Zealously.
DR 7-102 Representing a Client within the Bounds of the Law.
DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
DR 7-104 Communicating with One of Adverse Interest.
DR 7-105 Threatening Criminal Prosecution.
DR 7-106 Trial Conduct.
DR 7-107 Trial Publicity.
DR 7-108 Communication with or Investigation of Jurors.
DR 7-109 Contact with Witnesses.
DR 7-110 Contact with Officials.

CANON 8. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.

Ethical Considerations.
Disciplinary Rules.
DR 8-101 Action as a Public Official.
DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers.

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

Ethical Considerations.
Disciplinary Rules.
DR 9-101 Avoiding Even the Appearance of Impropriety.
DR 9-102 Preserving Identity of Funds and Property of a Client.

Editor's Note. — The Code of Professional Responsibility was adopted by the Council of the North Carolina State Bar on Jan. 12, 1973, amended April 13, 1973, and approved by the Supreme Court April 30, 1973. Effective Jan. 1, 1974, it replaces the Canons of Ethics in Appendix VII in the Replacement Volume.

Preamble and Preliminary Statement

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only

through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Preliminary Statement

In furtherance of the principles stated in the Preamble, The North Carolina State Bar has promulgated this Code of Professional Responsibility, consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system and with the legal profession. They embody the general concepts from which the Ethical Consideration and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for

violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1

A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession

Legal Periodicals. — For a symposium focusing upon the need for reform of the ABA Code of Professional Responsibility, see 57 N.C.L. Rev. 495 (1979).

CASE NOTES

Effect of Plea of Nolo Contendere on Subsequent Disciplinary Proceedings. — Defendant's plea of nolo contendere in the Federal District Court to a charge of receiving and possessing chattels valued at less than $100.00 knowing them to have been stolen or embezzled did not entitle the State Bar to summary judgment authorizing disciplinary action against the defendant. North Carolina State Bar v. Hall, 293 N.C. 539, 238 S.E.2d 521 (1977).

ETHICAL CONSIDERATIONS

EC1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and education standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC1-4 The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

DISCIPLINARY RULES

DR1-101 Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR1-102 Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in professional conduct that is prejudicial to the administration of justice.

(6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged the respondent's conduct before hearing evidence on alleged violations of subsections (1) and (5) of this rule and DR 6-101(3), his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Right to Effective Assistance of Counsel. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Cited in Williams v. Council of N.C. State Bar, 46 N.C. App. 824, 266 S.E.2d 391 (1980).

DR1-103 Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge of a clear violation of DR1-102 should report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

CASE NOTES

Knowledge of Failure to Perfect Appeal Not "Knowledge of a Clear Violation". — An allegation that defendant attorney and defendant district court judges knew that plaintiff's attorney had failed to perfect an appeal does not support an inference that defendants had "knowledge of a clear violation of DR 1-102" which defendants should have reported to the state and district bars pursuant to this rule, since there are many legitimate reasons as to why an appeal may not be perfected. Williams v. Council of N.C. State Bar, 46 N.C. App. 824, 266 S.E.2d 391 (1980).

CANON 2

A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available

Legal Periodicals. — For note on covenants not to compete between attorneys, see 50 N.C.L. Rev. 936 (1972).

For article, "The Advent of Prepaid Legal Services in North Carolina," see 13 Wake Forest L. Rev. 271 (1977).

For note on an attorney's right to compensation when discharged without cause from a contingent fee contract, see 15 Wake Forest L. Rev. 677 (1979).

CASE NOTES

Applied in Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

ETHICAL CONSIDERATIONS

EC2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information

relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers, and a lawyer who participates in such activities should shun personal publicity.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-2.

EC2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-3.

EC2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-4.

EC2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-5.

Selection of a Lawyer: Generally

EC2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in

whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers. Lack of information about (1) the availability of lawyers, (2) the practice preferences of particular lawyers, and (3) the expense of legal representation leads laypersons to avoid seeking legal advice.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-7.

EC2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, or other media, should be formulated to convey other information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates; addresses; telephone numbers; credit card acceptability; fluency in foreign languages; and office hours; (2) relevant biographical information; (3) description of the practice, for example, one or more fields of law in which the lawyer or law firm practices or a statement that practice is limited to one or more fields of law; and (4) permitted fee information. Self-laudation is unprofessional and improper.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-8.

Selection of a Lawyer: Lawyer Advertising

EC2-9 The lack of sophistication on the part of many members of the public concerning legal services, the importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising, require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in lawyer advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result,

inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulations of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-9.

EC2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant and is disseminated in an objective and understandable fashion. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. And change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-10.

EC2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-11.

EC2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC2-14 In some instances a lawyer confines his practice to a particular field of law. Because of the absence of controls to insure the existence of special competence, a lawyer should not hold himself out as a specialist, or as having special training or ability, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation of his practice or that he practices in one or more particular areas or fields of law, using designations authorized for that purpose by The North Carolina State Bar. If a lawyer discloses areas of law in which he practices or limits his practice, he should avoid any implication that he is in fact especially competent.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote EC 2-14.

EC2-15 The legal profession has developed a lawyer referral system designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel:

Persons Able to Pay Reasonable Fees

EC2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC2-19 As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing to the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a **res** out of which the fee can be paid. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a **res** with which to pay the fee.

EC2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.

Financial Ability to Employ Counsel:

Persons Unable to Pay Reasonable Fees

EC2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a

lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws,

a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DISCIPLINARY RULES

DR2-101 Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential customers of legal services, a lawyer may publish or broadcast, subject to DR2-103, information in print media or over radio [or] television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR2-101 (A) and be presented in a dignified manner without the use of the lawyer's voice or portrait and without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or pictures. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
(2) One or more fields of law in which the lawyer or law firm practices, or a statement that practice is limited to one or more fields of law, to the extent authorized under DR2-105;
(3) Date and place of birth;
(4) Date and place of admission to the bar of state and federal courts;
(5) School attended, with dates of graduation and degrees awarded;
(6) Foreign language ability;
(7) Whether credit cards or other credit arrangements are accepted;
(8) Office and telephone answering service hours;
(9) Fee for an initial consultation;
(10) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(11) Contingent fee rates subject to DR2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(12) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information;
(13) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled to without obligation an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;
(14) Fixed fees for an uncontested divorce, an uncontested adoption, an uncontested personal bankruptcy, a change of name, and other,

specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the categories described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to The North Carolina State Bar. Any such application shall be served upon The North Carolina State Bar, which shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as amendments to DR 2-101(B) and other affected ethical considerations and disciplinary rules, universally applicable to all lawyers.

(D) If the advertisement is communicated to the public over radio or television, it shall be prerecorded and approved in advance by the lawyer. A copy of all written advertisements and a written transcript of the actual transmission of all broadcast advertisements, certified to be an accurate copy or transcript by affidavit of a representative of the publisher or broadcaster, shall be retained by the lawyer for a period not less than three years.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year. Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made thereon for a period of not less than 30 days after such broadcast.

(G) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(H) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote DR 2-101.

Legal Periodicals. — For article on lawyer advertising, see 18 Wake Forest L. Rev. 503 (1982).

DR2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(5) A listing in a reputable law list, legal directory, or a directory published by a state, county or local bar association, giving brief biographical and other informative data. A law list or any directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. The published data may include the information allowed by DR 2-101(B) together with the following: one or more of the practice area designations or descriptions regularly used by the reputable law list or directory; scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional licenses; memberships in scientific, technical and professional associations and societies; names and addresses of references; and, with their consent, names of clients regularly represented.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote DR 2-102.

The amendment approved June 6, 1978, inserted "one or more of the practice area designations or descriptions regularly used by the reputable law list or directory;" near the beginning of the third sentence of subdivision (5) of subsection (A).

CASE NOTES

Applied in Hester v. Martindale-Hubbell, Inc., 493 F. Supp. 335 (E.D.N.C. 1980).

Cited in Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981).

DR2-103 Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, of himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that,

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, and may cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided that [the] following conditions are satisfied:

(a) Such organization, whether or not organized for profit, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers.

(b) Neither the lawyer, nor his partner; nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, at his own expense, select counsel in addition to that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and

other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote DR 2-103.

DR2-104 Suggestion of Need of Legal Services.

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote DR 2-104.

DR2-105 Designation of Areas of Practice.

A lawyer shall not hold himself out publicly as a specialist or as having better qualifications than others. But a lawyer may in a manner consistent with DR 2-101 and DR 2-102 hold himself out publicly as practicing in certain areas of law or as limiting his practice as follows:

(A) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(B) Any lawyer may publicly disclose the field or fields of law in which the lawyer or the law firm practices, or to which the practice is limited, but only by using the practice area designations authorized by the North Carolina State Bar and published in its official publications.

Effect of Amendments. — The amendment approved by the Supreme Court February 24, 1978, rewrote DR 2-105.

DR2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of the law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR2-107 Division of Fees among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment pursuant to a separation or retirement agreement.

DR2-108 Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR2-109 Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law.

DR2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken from him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR2-110 (B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

CANON 3

A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

ETHICAL CONSIDERATIONS

EC3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay-persons. Such delegation is proper if the lawyer maintains a direct

relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or a law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

DISCIPLINARY RULES

DR3-101 Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR3-102 Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
  (1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons.
  (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.
  (3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR3-103 Forming a Partnership with a Non-Lawyer.
(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Disqualification. — Under this Canon and Canon 9, if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. It is not necessary to show the attorney received confidential information. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Discretion of Court as to Disqualification. — It is within the discretion of the trial court as to disqualifying an attorney for his former representation of an opposing party. This discretion must be exercised within the parameters of this Canon and Canon 9. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Factors Considered in Disqualifying Attorney. — In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Waiver of Right to Have Attorney Disqualified. — A party can waive his right to have his former attorney disqualified. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege. An attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Dual Representation Proper. — A law firm which represented an insurance company in securing information to bring the insurance company back into compliance with North Carolina law and in rehabilitation proceedings was not prohibited from representing plaintiff minority shareholders of the company in a derivative action against the company's directors. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

ETHICAL CONSIDERATIONS

EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law officer exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR4-101 (C), a lawyer shall not knowingly:
  (1) Reveal a confidence or secret of his client.
  (2) Use a confidence or secret of his client to the disadvantage of the client.
  (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:
  (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
  (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
  (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
  (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR4-101 (C) through an employee.

CASE NOTES

Cited in In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

Legal Periodicals. — For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

CASE NOTES

No Improper Acquisition of Interest in Subject Matter of Litigation. — A fee arrangement whereby a law firm would receive a one-third interest in the shares it was representing in a derivative action by minority shareholders of a corporation against directors of the corporation did not constitute an acquisition by the law firm of an improper interest in the subject matter of the litigation. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

Representation of Multiple Clients Resulting in Conflict of Interest. — In a suit against the United States to recover losses resulting from an airplane crash, representation by the Department of Justice of both the United States and individual air traffic controllers would create a conflict of interest and would prevent adequate representation of

the individual controllers. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977).

Informed Consent of Client as to Potential Conflict of Interest. — The consent of an individual litigant to representation by counsel with a potential conflict of interest by his representation of another party cannot be presumed to be fully informed when it is procured without the advice of a lawyer who has no conflict of interest. Aetna Cas. & Sur. Co. v. United States, 438 F. Supp. 886 (W.D.N.C. 1977).

Applied in Aetna Cas. & Sur. Co. v. United States, 570 F.2d 1197 (4th Cir. 1978).

ETHICAL CONSIDERATIONS

EC5-1 The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice.

EC5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

EC5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judg-

ment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have conflicting interests.

EC5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with conflicting interests and there are few situations in which he would be justified in representing in litigation multiple clients with potentially conflicting interests. If a lawyer accepted such employment and the interests did become actually conflicting, he would have to withdraw from employment with the likelihood of resulting hardship on the clients; and for this reason, it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involved in litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become conflicting, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can

fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

EC5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interest and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already

undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISCIPLINARY RULES

DR5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

CASE NOTES

Testifying on Behalf of Clients. — The Supreme Court of North Carolina has historically discouraged the practice of attorneys testifying on behalf of clients, and although it has been allowed, in most instances the lawyer acting as witness for his client has surrendered

his right to participate in the litigation. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

If it becomes obvious that an attorney ought to testify on behalf of his client it is clear that he may do so, but he or any member of his firm shall not continue representation in the trial unless he can come under the exceptions listed in paragraphs (B)(1) through (B)(4). Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The weight of authority in this country is that while it is a breach of professional ethics for an attorney for a party to testify as to matters other than formal matters without withdrawing from the litigation, he is not incompetent so to testify. The testimony is admissible if otherwise competent. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

While the Disciplinary Rules set forth in the Code of Professional Conduct do not control the admissibility of evidence or the competency of witnesses, they do govern the ethics and conduct of attorneys licensed to practice law in the State, and it should be the policy of the courts to give effect to these rules which specifically address the question of when an attorney may be a witness for a party he represents. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

There is no inconsistency in the Code of Professional Conduct and the uniform practice that has existed in North Carolina with respect to attorneys testifying on behalf of clients. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

Both the Code of Professional Conduct and the common practice recognized by the North Carolina Supreme Court provide for exceptions whereby attorneys may testify on behalf of clients. Town of Mebane v. Iowa Mut. Ins. Co., 28 N.C. App. 27, 220 S.E.2d 623 (1975).

The terms of this rule and DR 5-102 were not a bar to the testimony of an attorney in a prosecution for the issuance of checks with knowledge of insufficient funds to pay the checks upon presentation, where the attorney had no official responsibility in the conduct of the trial of the defendant on criminal charges, and his only connection with the case was his attempt to procure payment for his client of obligations owed to the client by the defendant, after defendant's checks were returned to the client for insufficient funds. State v. Passmore, 37 N.C. App. 5, 245 S.E.2d 107, cert. denied, 295 N.C. 556, 248 S.E.2d 734 (1978).

DR5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR5-101 (B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

CASE NOTES

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DR5-103 Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
(1) Acquire a lien granted by law to secure his fee or expenses.
(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR5-104 Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer should decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR5-105 (C).

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR5-105 (C).

(C) In the situations covered by DR5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR5-105, no partner or associate of his or his firm may accept or continue such employment.

CASE NOTES

Where two members of same law firm serve as counsel for codefendants with conflicting interests, a division of loyalties occurs. State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980).

Denial of Effective Assistance of Counsel. — The existence of an actual conflict of interest between two codefendants, tried in a joint trial and represented by two members of the same law firm or by single counsel, constitutes a denial of effective assistance of counsel when actual prejudice may be shown. State v. Arsenault, 46 N.C. App. 7, 264 S.E.2d 592 (1980).

Cited in Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978).

DR5-106 Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:
  (1) Accept compensation for his legal services from one other than his client.
  (2) Accept from one other than his client anything of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
  (1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  (2) A non-lawyer is a corporate director or officer thereof; or
  (3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

CANON 6

A Lawyer Should Represent a Client Competently

ETHICAL CONSIDERATIONS

EC6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who

consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not or does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

DISCIPLINARY RULES

DR6-101 Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

CASE NOTES

Where it appeared on the face of the notice of charges in a disciplinary proceeding that the judge may have prejudged the respondent's conduct before hearing evidence on alleged violations of DR 1-102(1) and (5), and subsection (3) of this rule, his order of suspension had to be vacated, and the case retained for rehearing by the Court of Appeals. In re Robinson, 37 N.C. App. 671, 247 S.E.2d 241 (1978); In re Dale, 37 N.C. App. 680, 247 S.E.2d 246 (1978).

Failure to Seek Appellate Review. — Appointed counsel who failed to seek appellate review in each of four criminal cases held in

violation of this rule. See In re Robinson, 39 N.C. App. 345, 250 S.E.2d 79 (1979).

Failure of the respondent attorney to perfect an appeal in a criminal case in which the sentence of death had been imposed was a violation of this rule. In re Dale, 39 N.C. App. 370, 250 S.E.2d 82, appeal dismissed, 296 N.C. 584, 254 S.E.2d 30 (1979).

Cited in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

DR6-102 Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

CASE NOTES

Applied in North Carolina State Bar v. Frazier, — N.C. App. —, 302 S.E.2d 648 (1983).

CANON 7

A Lawyer Should Represent a Client Zealously within the Bounds of the Law

CASE NOTES

It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

A cross-examination by which the prosecutor places before the jury inadmissible and prejudicial matter is highly improper and, if knowingly done, unethical. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

Injecting Beliefs Not Supported By Evidence. — Counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. State v. Locklear, 294 N.C. 210, 241 S.E.2d 65 (1978).

ETHICAL CONSIDERATIONS

EC7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

EC7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

CASE NOTES

Cited in In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Duty of the Lawyer to a Client.

EC7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a

criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceedings has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged, and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice.

EC7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice, promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the bases for standards of professional conduct set forth in the Disciplinary Rules.

EC7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to

make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced.

There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

CASE NOTES

Removal of Juror Justified. — The trial judge did not abuse his discretion in removing a juror and substituting the alternate juror where the original juror contacted defense counsel at his home during the week-end recess and persisted in discussing matters of a personal nature, including counsel's marital status, and though there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

EC7-30 Vexations or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.

EC7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror or a member of the family of either should make a prompt report to the court regarding such conduct.

EC7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal.

EC7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought

before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal references to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR7-101 Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR2-110, DR5-102, and DR5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR7-102 (B).

(B) In his representation of a client, a lawyer may:
(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR7-102 Representing a Client within the Bounds of the Law.
(A) In his representation of a client, a lawyer shall not:
(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony of false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
(B) A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw.
(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Legal Periodicals. — For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

Right to Effective Assistance of Counsel. — It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Cited in North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982).

DR7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
(A) A public prosecutor or other government lawyer shall not institute or

cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR7-104 Communicating with One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

CASE NOTES

Inculpatory Statements by Person in Custody. — This rule proscribes only certain conduct by members of the legal profession during the course of representation and does not prevent persons in custody from making inculpatory statements upon waiver of the right to counsel. State v. Romero, 56 N.C. App. 218, 286 S.E.2d 903, cert. denied, 306 N.C. 391, 294 S.E.2d 218 (1982).

DR7-105 Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

CASE NOTES

Cited in Northwestern Bank v. Moretz, 56 N.C. App. 710, 289 S.E.2d 614 (1982).

DR7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.
(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.
(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.
(7) Intentionally or habitually violate any established rule of procedure or evidence.

DR7-107 Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:
(1) Information contained in a public record.
(2) That the investigation is in progress.
(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.
(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.
(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.
(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.
(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.
(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.
(5) The identity, testimony, or credibility of a prospective witness.
(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR7-107 (B) does not preclude a lawyer during such period from announcing:
(1) The name, age, residence, occupation, and family status of the accused.
(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.
(3) A request for assistance in obtaining evidence.
(4) The identity of the victim of the crime.
(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.
(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.
(8) The nature, substance, or text of the charge.
(9) Quotations from or references to public records of the court in the case.
(10) The scheduling or result of any step in the judicial proceedings.
(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution of defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness, or prospective witness.
(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:
(1) Evidence regarding the occurrence or transaction involved.
(2) The character, credibility, or criminal record of a party, witness or prospective witness.
(3) Physical evidence or the performance or results of any examination or tests or the refusal or failure of a party to submit to such.
(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.
(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR7-107.

DR7-108 Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR7-108 (A) and (B) do not prohibit a lawyer from communicating with veniremen or jurors in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

CASE NOTES

Removal of Juror Justified. — The trial judge did not abuse his discretion in removing a juror and substituting the alternate juror where the original juror contacted defense counsel at his home during the week-end recess and persisted in discussing matters of a personal nature, including counsel's marital status, and though there was no evidence that any matter which related to the trial of defendant was discussed during the conversation, the exercise of discretion by the trial judge served to safeguard the trial of defendant from even the appearance of impropriety. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

DR7-109 Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR7-110 Contact with Officials.

(A) A lawyer shall not give or lend anything of substantial value to a judge, official or employee of a tribunal.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public he should espouse only those changes which he conscientiously believes to be in the public interest.

EC8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and

secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself, or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR8-102 Statements Concerning Judges and Other Adjudicatory Officers.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

CASE NOTES

Disqualification. — Under Canon 4 and this Canon, if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. It is not necessary to show the attorney received confidential information. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Discretion of Court as to Disqualification. — It is within the discretion of the trial court as to disqualifying an attorney for his former representation of an opposing party. This discretion must be exercised within the parameters of Canon 4 and this Canon. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Factors Considered in Disqualifying Attorney. — In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Party can waive his right to have his former attorney disqualified. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege. An attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others. Lowder v. All Star Mills, Inc., — N.C. App. —, 300 S.E.2d 230 (1983).

Applied in Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

ETHICAL CONSIDERATIONS

EC9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstanding and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had

substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC9-6 There is now available to the members of the legal profession the opportunity to participate in a program for the advancement of our legal system. It is now possible for an attorney to elect to invest in an interest bearing account advances of clients that are nominal in amount or to be held for a short period of time with the income derived to be used for purposes beneficial to the public through a program established by the North Carolina State Bar and approved by the North Carolina Supreme Court. Lawyers are encouraged to participate in this endeavor for the general public. This is an excellent example of how the individual attorney can aid in making needed changes and improvements.

Cross References. — For disciplinary rule as to deposit of client funds in interest-bearing trust accounts, see DR 9-102. For standing committee on disposition of interest on client funds placed in trust accounts, see Article VI, § 5 of the Rules, Regulations and Organization of The North Carolina State Bar.

Effect of Amendments. — The amendment adopted April 8, 1983, renumbered the former provisions of EC 9-6, relating to a lawyer's duty to uphold the integrity and honor of the profession, as EC 9-7 and adopted present EC 9-6.

EC9-7 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Editor's Note. — The order adopted April 8, 1983, renumbered former EC 9-6 as EC 9-7.

DISCIPLINARY RULES

DR9-101 Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

DR9-102 Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(3) Except as may be authorized by DR 9-102(C), interest earned on bank accounts in which the funds of clients are deposited (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) shall belong to the clients whose funds have been deposited; and the lawyer or law firm shall have no right or claim to such interest.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client or promptly pay or deliver as directed by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) (1) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest bearing trust account for those funds of clients which, in his good faith judgment, are nominal in amount or are expected to be held for a short period of time. A lawyer may be compelled to invest on behalf of a client, in accordance with DR 9-102(A)(3), only those funds not nominal in amount or not expected to be held for short period of time. Funds deposited in a permitted interest bearing trust account under the plan must be available for withdrawal upon request and without delay. The account shall be maintained in a depository institution authorized by State or federal law to do business in North Carolina and insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the North Carolina Guaranty Corporation. A lawyer participating in the plan shall deliver to all clients from whom or for whose benefit such funds are received a notice reading substantially as follows and comply with its provisions:

IMPORTANT NOTICE TO CLIENTS.

THIS OFFICE PARTICIPATES IN THE NORTH CAROLINA PLAN REGARDING THE GENERATION OF INTEREST ON ATTORNEY'S TRUST ACCOUNTS.

Under this plan, funds deposited on behalf of a client that are nominal in amount or are expected to be held for a short period of time will be deposited in an interest bearing trust account and the interest generated will be remitted to the North Carolina State Bar to fund programs for the public's benefit. The costs of maintaining an interest bearing account on an individual client's funds which are nominal in amount or held for a short period of time exceed the amount of interest that may be earned on such funds. Therefore, such client funds are placed in one trust account from which distribution is made at the client's direction and, until recent changes in banking laws, the trust account could not earn interest. Under current law, a trust account is permitted to earn interest under certain circumstances. It is only when all client funds are deposited into the single account with the interest going to a public purpose that such an account can be established. Under no conditions, including any request that the funds not be placed in such an account, can the client benefit individually from the interest earned. The attorney will not receive any of the interest generated under the plan.

(2) Lawyers or law firms electing to deposit client funds in a trust account shall direct the depository institution:

(A) To remit interest or dividends, as the case may be (less any deduction for bank service charges, fees of the depository institution, and intangible taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(B) To transmit with each remittance to the North Carolina State Bar a statement showing the name of the lawyer or law firm maintaining the account with respect to which the remittance is sent and the rate of interest applied in computing the remittance;

(C) To transmit to the depositing lawyer or law firm at the same time a report showing the amount remitted to the North Carolina State Bar and the rate of interest applied in computing the remittance;

(3) Certificates of deposit may be obtained by a lawyer or law firm on some or all of any deposited funds of clients, so long as there is no impairment of the right to withdraw or transfer principal immediately.

Cross References. — For ethical consideration as to deposit of client funds in interest-bearing trust accounts, see EC 9-6. For standing committee on disposition of interest on client funds placed in trust accounts, see Article VI, § 5 of the Rules, Regulations and Organization of The North Carolina State Bar.

Effect of Amendments. — The amendment adopted April 8, 1983, added subdivision (A)(3), substituted "or promptly pay or deliver as directed by the client" for "as requested by a client" in subdivision (B)(4), and added subdivision (C).

Appendix VII-A. Code of Judicial Conduct

Canon

1. A Judge Should Uphold the Integrity and Independence of the Judiciary.
2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.
3. A Judge Should Perform the Duties of His Office Impartially and Diligently.
4. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.
5. A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.
6. A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities.
7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

Editor's Note. — The North Carolina Code of Judicial Conduct was adopted by the Supreme Court of North Carolina in conference on Sept. 26, 1973, and became effective upon publication thereof in the Advance Sheets of the North Carolina Reports. The Code of Judicial Conduct was published in 283 N.C., Advance Sheet No. 6.

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Legal Periodicals. — For article, "The Discipline and Removal of Judges in North Carolina," see 4 Campbell L. Rev. 1 (1981).

CASE NOTES

Code Is Guide to Meaning of § 7A-376. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of § 7A-376. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special posi-

tion to influence him. He should not testify voluntarily as a character witness.

CASE NOTES

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) The use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) The broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) The photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) The means of recording will not distract participants or impair the dignity of the proceedings;

(ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) The reproduction will be exhibited only for instructional purposes in educational institutions.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;

(b) He served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) The degree of relationship is calculated according to the civil law system;

(b) "Fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "Financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that hold securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1)(c) or Canon 3C(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Subdivision A(7) Suspended until Oct. 18, 1984. — The order adopted Sept. 21, 1982, and effective Oct. 18, 1982, provides that subdivision A(7) of this Canon and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including Oct. 18, 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed on an experimental basis, in accordance with the terms of the order. For the aforementioned order concerning electronic media and still photography coverage of public judicial proceedings, see Appendix I-A of this volume.

Legal Periodicals. — For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

CASE NOTES

The failure of a judge to make due inquiry into the facts and law upon which his judgments were based and his execution of them upon a mere ex parte application of counsel for defendants violates this Canon. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Failure to Accord Prosecutor Opportunity to Be Heard. — A criminal prosecution is an adversary proceeding in which the prosecuting attorney and defendant or his counsel are entitled to be present and to be heard. Failure to accord the prosecutor such opportunity violates this Canon. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Failure to Disqualify Himself on Motion to Recuse. — The trial judge committed error by not disqualifying himself from considering a motion to recuse himself from hearing the plaintiffs' motion to set aside a judgment on grounds of excusable neglect, since a reasonable man knowing all the circumstances would have had doubts about the judge's ability to rule on the motion to recuse in an impartial manner. McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978).

Applied in In re Greene, — N.C. —, 297 S.E.2d 379 (1982).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

B. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve

him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) A judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) A judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities. A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

E. Arbitration. A judge should not act as an arbitrator or mediator.
F. Practice of Law. A judge should not practice law.
G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.
B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.
C. Public Reports. A judge shall report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. No report is required if no such compensation or reimbursement of expenses is received. The word "activity" as used in Canon 6 does not include the receipt of rents, dividends or interest or profits realized from capital gains. Any required report should be made annually and filed as a public document as follows: The members of the Supreme Court should file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals should file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, regular, special, and emergency, and each District Court Judge, should file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report should be filed during the month of January of the following year.

Effect of Amendments. — The amendment adopted Dec. 30, 1974, substituted "shall" for "should" in the first sentence of subdivision C and rewrote all of subdivision C following the first sentence.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. Political Conduct in General.

(1) A judge or candidate for election to judicial office should not:

(a) Act as a leader or hold any office in a political organization. For example, he may not attend a political convention on any level as a delegate; nor may he preside or serve as an officer at any precinct meeting, convention, or other political convocation. He may attend a precinct meeting, convention or other political convocation provided he does not violate any other Canon, particularly 7A(1)(b) or (c).

(b) Make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge or candidate for judicial office may endorse, as between contestants for a judicial office, the candidate he considers best qualified and may contribute to a campaign fund in behalf of such candidate, but may not solicit funds in behalf of such candidate.

(c) Solicit funds for a political organization or candidate.

(d) Make financial contributions to any candidate for political office, except as expressly provided in subsection (b) hereinabove, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or reelection, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) Should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) Should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) Should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or

misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit campaign funds, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Effect of Amendments. — The amendment adopted Dec. 30, 1974, added the proviso to subdivision (1)(b) of subsection A.

The amendment adopted March 16, 1976, added the last two sentences in subdivision (1)(a) of subsection A, substituted "or candidate for judicial office" for "who is not at that time a candidate for election to judicial office" in the proviso to subdivision (1)(b) of subsection A, added subdivisions (1)(d) and (4) to subsection A and deleted "only insofar as permitted by law" in subdivision (2) of subsection A.

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) Continue to act as an officer, director, or non-legal advisor of a family business;

(b) Continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

Appendix VIII. Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases

Article
IV. Appointment of Counsel.
VI. Procedure for Payment of Compensation.

Article IV.

Appointment of Counsel.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, an indigent defendant charged with a capital offense shall be entitled to be represented by one counsel provided in appropriate cases in the discretion of the Court one additional assistant counsel at either the trial or appellate level, or both, may be appointed.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime in a district which does not have a public defender:

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court may in its discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

Only Part of Article Set Out. — As the rest of this Article was not changed by the amendment, only §§ 4.8 to 4.10 are set out.

Effect of Amendments. — The amendment adopted by the Council of The North Carolina State Bar at its meeting on October 27, 1977,

further considered on January 13, 1977, and April 14, 1978, and approved by the Supreme Court May 26, 1978, added §§ 4.8 to 4.10.

Article VI.

Procedure for Payment of Compensation.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court.

Only Part of Article Set Out. — As the rest of this Article was not changed by the amendment, only § 6.6 is set out.

Effect of Amendments. — The amendment adopted by the Council of The North Carolina State Bar at its regular quarterly meeting in July, 1973, and approved by the Supreme Court Aug. 31, 1973, added § 6.6.

Appendix IX. Rules Governing Admission to Practice of Law

(Effective February 1, 1976.)

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21

OCCUPATIONAL LICENSING BOARDS

CHAPTER 30

BOARD OF LAW EXAMINERS

Section .0100. Organization

.0101 ADDRESS
.0102 PURPOSE
.0103 MEMBERSHIP

Section .0200. General Provisions

.0201 COMPLIANCE NECESSARY
.0202 DEFINITIONS
.0203 APPLICANTS
.0204 LIST
.0205 HEARINGS
.0206 NONPAYMENT FEES

Section .0300. Registration

.0301 WHO MUST REGISTER
.0302 REGISTRATION FORMS
.0303 FILING DATE
.0304 FEES; LATE REGISTRATION

Section .0400. Applications of General Applicants

.0401 HOW TO APPLY
.0402 APPLICATION FORM
.0403 FILING DEADLINE
.0404 FEES
.0405 REFUND OF FEES
.0406 BAD CHECK POLICY (Deleted)

Section .0500. Requirements for Applicants

.0501 REQUIREMENTS FOR GENERAL APPLICANTS
.0502 REQUIREMENTS FOR COMITY APPLICANTS

Section .0600. Moral Character

.0601 BURDEN OF PROOF
.0602 INFORMATION
.0603 FAILURE TO DISCLOSE
.0604 BAR CANDIDATE COMMITTEE
.0605 DENIAL; RE-APPLICATION

Section .0700. Educational Requirements

.0701 GENERAL EDUCATION
.0702 LEGAL EDUCATION

Section .0800. Protest

.0801 NATURE OF PROTEST
.0802 FORMAT
.0803 NOTIFICATION; RIGHT TO WITHDRAW
.0804 HEARING
.0805 WITHHOLDING LICENSE

Section .0900. Examinations

.0901 WRITTEN EXAMINATION
.0902 DATES
.0903 SUBJECT MATTER
.0904 PASSING SCORE

Section .1000. Review of Written Bar Examination

.1001 REVIEW
.1002 FEES
.1003 MULTISTATE BAR EXAMINATION
.1004 SCORES
.1005 BOARD REPRESENTATIVE

Section .1100. Rulemaking Procedures

[Repealed]

Section .1200. Board Hearings

.1201 NATURE OF HEARINGS
.1202 NOTICE OF HEARING
.1203 WHO SHALL CONDUCT HEARINGS
.1204 CONTINUANCES; MOTIONS FOR
.1205 SUBPOENAS
.1206 DEPOSITIONS AND DISCOVERY

.1207 REOPENING OF A CASE

Section .1300. Licenses

.1301 INTERIM PERMIT FOR COMITY APPLICANTS
.1302 LICENSES FOR GENERAL APPLICANTS

Section .1400. Judicial Review

.1401 APPEALS
.1402 NOTICE
.1403 RECORD TO BE FILED
.1404 WAKE COUNTY SUPERIOR COURT
.1405 NORTH CAROLINA SUPREME COURT

SECTION .0100. ORGANIZATION

.0101 Address

The offices of the Board of Law Examiners of the State of North Carolina are located in the Law Building at 107 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 a.m. to 5:00 p.m., Monday through Friday.

History Note: Statutory Authority G.S. 84-24; 150A-60; Eff. February 1, 1976.

.0102 Purpose

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0103 Membership

The Board of Law Examiners of the State of North Carolina consists of eleven members of the North Carolina Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.
Effect of Amendments. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and filed July 1, 1977, substituted "eleven members" for "nine members" in the first sentence.

SECTION .0200. GENERAL PROVISIONS

.0201 Compliance Necessary

No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0202 Definitions

(a) The term "board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the board.

(b) The term "Secretary" as used in this chapter refers to the "Executive Secretary of the Board of Law Examiners of the State of North Carolina."

(c) Every word importing the masculine gender only shall extend and be applied to females as well as to males.

(d) As used in these rules, the word "filing" or "filed" shall mean received in the office of the Board of Law Examiners.

(e) As used in these rules, the word "chapter" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Effect of Amendments. — The amendment adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977, added the second sentence of subsection (a) and added subsections (d) and (e).

.0203 Applicants

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0204 List

As soon as possible after the filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0205 Hearings

Every applicant may be required to appear before the board to be examined about any matters pertaining to his or her moral character, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0206 Nonpayment Fees

Failure to pay the fees as required by these rules shall result in a denial of the registration or application to take the North Carolina Bar Examination. All checks payable to the board for any fees which are not honored upon presentment shall be returned to the registrant or applicant who shall, within ten (10) days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order, any fees payable to the board.

Editor's Note. — This rule was adopted by the Board of Law Examiners on June 23, 1977, and certified July 1, 1977.

SECTION .0300. REGISTRATION

.0301 Who Must Register

Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the secretary at the offices of the board a properly completed registration form prescribed and supplied by the board. The registration form may be obtained by writing or calling the offices of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0302 Registration Forms

Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the board. The registration form requires a person to supply information relating to his background, including family, education, employment, whether he has been a party to any disciplinary or legal proceedings, character references and a certification to be completed by the applicant's dean.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0303 Filing Date

Registrations shall be filed with the secretary at the offices of the board at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0304 Fees; Late Registration

Each registration by a resident of the State of North Carolina must be accompanied by a fee of $25.00 and each registration by a non-resident shall be accompanied by a fee of $40.00. An additional fee of $50.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

History Note: Statutory Authority G.S. 84-24, 25; Eff. February 1, 1976.

SECTION .0400. APPLICATIONS OF GENERAL APPLICANTS

.0401 How to Apply

After complying with the registration provisions of Section .0300 of this Chapter, applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or calling the board's offices.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0402 Application Form

The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0403 Filing Deadline

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon petition to the board and for good cause shown and upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than the third Tuesday in February of the year in which the applicant applies to take the written bar examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.
Effect of Amendments. — The amendment adopted June 23, 1977, certified July 1, 1977, added the proviso.

.0404 Fees

Every application by a general applicant who:

(1) Is a resident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $200.00.

(2) Is a resident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $345.00.

(3) Is a nonresident of the State of North Carolina and who is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $200.00 plus such fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

(4) Is a nonresident of the State of North Carolina and who is a licensed attorney in any other jurisdiction shall be accompanied by a fee of $345.00 plus such other fee as the National Conference of Bar Examiners or its successor may charge from time to time for processing an application of a nonresident.

History Note: Statutory Authority G.S. 84-24; 25; Eff. February 1, 1976.

Effect of Amendments. — The amendment of May 4, 1982, rewrote this rule.

.0405 Refund of Fees

No part of the fee required by Rule .0404 of this chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0406 Bad Check Policy (Deleted)

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Effect of Amendments. — This rule was deleted by amendment adopted June 23, 1977, certified July 1, 1977.

SECTION .0500. REQUIREMENTS FOR APPLICANTS

.0501 Requirements for General Applicants

Before being licensed by the board to practice law in the state of North Carolina, a general applicant shall:

(1) be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(2) have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter;

(3) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(4) be of the age of at least eighteen (18) years;

(5) be and continuously have been a bona fide citizen and resident of the state of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the written bar examination;

(6) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(7) stand and pass a written bar examination as prescribed in Section .0900 of this Chapter;
(8) have stood and passed the Multistate Professional Responsibility Examination approved by the board within the twenty-four (24) month period next preceding the beginning day of the written bar examination prescribed by Section .0900 of this Chapter which the applicant passes, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter. (This subsection shall apply only to applicants who apply to take the July 1984 and subsequent examinations.)

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Effect of Amendments.— The amendment adopted June 23, 1977, certified July 1, 1977, repealed former subdivision (4), relating to U.S. citizenship.

The amendment adopted April 8, 1983, and applicable only to applicants who apply to take the July, 1984, and subsequent examinations, added subdivision (8).

.0502 Requirements for Comity Applicants

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, immigrating or who has heretofore immigrated to North Carolina from such jurisdiction, upon written application may, in the discretion of the board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Secretary, upon such forms as may be supplied by the board, a typed application in duplicate which will be considered by the board after at least six (6) months from the date of filing; the application requires:
  (a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, references, the nature of the applicant's practice of law, and familiarity with the Code of Professional Responsibility as Promulgated by the North Carolina State Bar;
  (b) That the applicant furnish the following documentation:
    i. Certificates of moral character from four (4) attorneys;
    ii. A recent photograph;
    iii. Two (2) sets of clear fingerprints;
    iv. A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying;
    v. Transcripts from the applicant's undergraduate and graduate schools;
    vi. A copy of all applications for admission to the practice of law that he has filed with any state, territory, or the District of Columbia;
    vii. A certificate of his admission to the bar of any state, territory, or the District of Columbia;
    viii. A certificate from the proper court or body of every state in which the applicant is licensed therein that he is in good standing and not under pending charges of misconduct;
(2) Pay to the board with each written application, a fee of $625.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a nonresident, no part of which may be refunded to the applicant whose application is denied;

(3) Be and continuously have been a bona fide resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina;

(4) Prove to the satisfaction of the board that the applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia having comity with North Carolina and that in such state, or territory of the United States, or the District of Columbia, the applicant has been for at least four out of the last six years, immediately preceding the filing of his application with the Secretary, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include:
   (a) The practice of law as defined by G.S. 84-2.1; or
   (b) Activities which would constitute the practice of law if done for the general public; or
   (c) Legal service as a corporate counsel; or
   (d) Judicial service in a court of record or other legal service with any local or state government or with the federal government; or
   (e) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States, whether or not such service is in the jurisdiction in which applicant is duly licensed; or

   Employment in North Carolina, when conducted pursuant to a license granted by another jurisdiction, to meet the requirement of this rule is limited to:
   (a) Employment as house counsel by a person, firm, association, or corporation engaged in business in this State which business does not include the selling or furnishing of legal advice or services to others; or
   (b) Employment as a full time faculty member of a law school approved by the Council of the North Carolina State Bar; or
   (c) Employment as a full time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill; or
   (d) Service as a member of a Judge Advocate General's Department of one of the military branches of the United States.

(5) Satisfy the board that the state, or territory of the United States, or the District of Columbia in which the applicant is licensed and from which he seeks comity will admit North Carolina attorneys to the practice of law in such state, or territory of the United States, or the District of Columbia without written examination, other than the Multistate Professional Responsibility Examination;

(6) Be in good professional standing in every state, or territory of the United States, or the District of Columbia in which the applicant has been licensed to practice law, and not under pending charges of misconduct.

(7) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter.

(8) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(9) Not have taken and failed the written North Carolina Bar Examination within ten (10) years prior to the date of filing the applicant's comity application.

(10) Have stood and passed the Multistate Professional Responsibility Examination approved by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

Effect of Amendments. — The amendment adopted at a regular quarterly meeting of the North Carolina State Bar and approved by the Supreme Court Jan. 31, 1977, inserted "the District of Columbia or a territory of the United States" and added "and" in paragraph (a) of subdivision (5), rewrote the introductory language in paragraph (b) of subdivision (5), deleted former clauses (iii) and (iv), and the former last sentence of paragraph (b) of subdivision (5) and added paragraph (c) of subdivision (5). Clauses (i) and (ii), and former clause (iii) and the next-to-last sentence of new paragraph (c) incorporated the substance of the provisions deleted in paragraph (b). The amendment also inserted "the District of Columbia or territory of the United States" in subdivision (7) and added subdivision (10).

The amendment adopted June 23, 1977, certified July 1, 1977, repealed subdivision (1), which read "be a citizen of the United States," and, in subdivision (5), deleted former clause (iii) of paragraph (c) as added by the amendment certified Jan. 27, 1977, added present paragraph (d), of which clause (ii) duplicates the clause deleted in paragraph (c), and inserted the reference to paragraph (d) near the end of subdivision (5).

The amendment adopted at a regular quarterly meeting of the Council of the North Carolina State Bar and approved by the Supreme Court Feb. 24, 1978, added subdivision (5)(e).

The amendment of Nov. 10, 1982, rewrote this rule.

The amendment adopted April 8, 1983, inserted "whether or not such service is in the jurisdiction in which applicant is duly licensed" in subdivision (4)(e) and added subdivision (10).

SECTION .0600. MORAL CHARACTER

.0601 Burden of Proof

Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a

prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evidence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Constitutional Challenge Held Moot. — Action seeking injunctive relief and declaration that bar rules regarding moral character were unconstitutional held moot following plaintiffs' admission to bar. See Nestler v. Board of Law Exmrs., 611 F.2d 1380 (4th Cir. 1980).

.0602 Information

All information furnished to the board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0603 Failure to Disclose

No one shall be licensed to practice law in this state by examination or comity:

(1) who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0604 Bar Candidate Committee

Every applicant shall appear before a bar candidate committee, appointed by the chairman of the board, in the judicial district in which he resides, or in such other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the committee as may be required on such forms as may be provided by the board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0605 Denial; Re-application

No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the board on the grounds of failure to prove good moral character shall be considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0700. EDUCATIONAL REQUIREMENTS

.0701 General Education

Each applicant to take the examination must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.
Effect of Amendments. — The amendment adopted June 23, 1977, and certified July 1, 1977, rewrote this rule.

.0702 Legal Education

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law shall file with the secretary a certificate from the president, dean or other proper official of the law school approved by the Council of the North Carolina State Bar, a list of which is available in the office of the secretary, or shall otherwise show to the satisfaction of the board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or for all general applicants who apply for admission to practice law in the State of North Carolina in or before the month of January, 1978, but not thereafter, that the applicant has successfully completed the courses required by the Council of the North Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Section

.0900 of this chapter being the same courses as those set out in Rule .0903 of this chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0800. PROTEST

.0801 Nature of Protest

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0802 Format

A protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0803 Notification; Right to Withdraw

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0804 Hearing

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him as provided by Rule .1302 of this chapter until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0805 Withholding License

Nothing herein contained shall prevent the board on its own motion from withholding its license to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .0900. EXAMINATIONS

.0901 Written Examination

One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0902 Dates

The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0903 Subject Matter

The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.0904 Passing Score

The board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1000. REVIEW OF WRITTEN BAR EXAMINATION

.1001 Review

An unsuccessful applicant to the bar examination may examine the test booklets containing his essay examination along with the model answers and the essay examination in the board's offices.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1002 Fees

The board will furnish an unsuccessful applicant a copy of his essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of the board's model answers will be made or furnished to any applicant.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1003 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

.1004 Scores

The board will not release to applicants the scores on bar examinations. Only upon written request of an applicant will the board furnish the Multistate Bar Examination score of said applicant to another board of bar examiners or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1005 Board Representative

The secretary of the board serves as the representative of the board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8; Eff. February 1, 1976.

SECTION .1100. RULEMAKING PROCEDURES

(Repealed)

Effect of Amendments. — This section was repealed by amendment adopted June 23, 1977, certified July 1, 1977.

SECTION .1200. BOARD HEARINGS

.1201 Nature of Hearings

(a) All general applicants may be required to appear before the board at a hearing to answer inquiry about any matter under these rules.

(b) Each comity applicant shall appear before the board to satisfy the board that he or she has met all the requirements of Rule .0502.

History Note: Statutory Authority G.S. 150A-11; 23; Eff. February 1, 1976.

Effect of Amendments. — This Section .1200, formerly entitled "Contested Cases," was rewritten by amendment adopted by the Board of Law Examiners June 23, 1977, and certified July 1, 1977. The amendment substituted present Rules .1201 through .1207 for former Rules .1201 through .1209. The history notes from the former rules in this section have been added to the corresponding rules in the section as amended.

CASE NOTES

"Good Moral Character" Defined. — Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

What Character Encompasses. — Character encompasses both a person's past behavior and the opinion of members of his community arising from it. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Showing Good Moral Character. — An applicant for admission to the bar has the burden of showing his good moral character. At the outset, he must come forward with sufficient evidence to make out a prima facie case. The board, or any other person wishing to contest an application, may then offer rebuttal evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden on Board to Show Particular Instances of Misconduct. — To place the burden on the applicant to disprove acts of misconduct would be a distortion of the intended effect of the rule requiring the applicant to prove, overall, his good character. In order to avoid this distortion it is necessary to distinguish between applicant's overall burden of showing good moral character and the board's burden of proving particular instances of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Whether a person is of good moral character is seldom subject to proof by reference to one or two incidents. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

An application for admission to the bar may not be denied on the basis of suspicions or accusations alone. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Burden of Proof to Be by Preponderance of Evidence. — When an applicant makes a prima facie showing of his good moral character and, to rebut the showing, the board relies on specific acts of misconduct the commission of which is denied by the applicant, the board must assume the burden of proving the specific acts by the greater weight of the evidence. The rule that applicant has the overall burden to prove his good moral character does not relieve the board from having to prove such specific acts of misconduct. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where Essential Facts Are Indisputably Established. — In cases in which all the essential facts either appear on the face of the application or are otherwise indisputably established, the board need only weigh the evi-

dence and determine whether the applicant has shown his good moral character. However, even in such cases, while it might be permissible for the board not to make specific findings of fact, a detailing of the facts on which it bases its conclusions would facilitate judicial review. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Board to Make Specific Findings of Fact. — When a decision of the board of law examiners rests on a specific fact or facts the existence of which is contested, the board's duty to resolve the factual dispute by specific findings is no less than that of other administrative agencies. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Where the only facts which could support a conclusion that the applicant did not show good moral character are in sharp dispute, the board must necessarily serve as the adjudicator of the facts in dispute and must ultimately find with regard to them what it believes the truth to be. Mere recitation of the testimony heard by the board will not suffice. Administrative agencies must find facts when factual issues are presented. They cannot fulfill this duty by merely summarizing the evidence. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

Scope of Judicial Review. — The "whole record" test is the proper scope of judicial review of findings of the board of law examiners. In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1202 Notice of Hearing

(a) The chairman will schedule the hearings before the board and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or his attorney within a reasonable time before the date of the hearing.

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1203 Who Shall Conduct Hearings

(a) All hearings shall be heard by the board except that the chairman may designate two or more members to serve as a panel to conduct these hearings.

(b) The panel will make a determination as to the applicant's eligibility to stand the written bar examination or to be licensed by comity. The panel may grant the application, deny the application, or refer it to the full board for a de novo hearing. The applicant will be notified in writing of the panel's determination. In the event of an adverse determination by the panel, the applicant may request a hearing de novo before the full board by giving written notice to the secretary at the offices of the board within ten (10) days following receipt of the panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the full board and shall result in the determination of the panel becoming final.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

Editor's Note. — Former Rule .1203, Examination Review Hearing, was repealed by amendment adopted at a regular quarterly meeting of the Council of the North Carolina State Bar and approved by the Supreme Court November 4, 1976.

Effect of Amendments. — The amendment adopted April 8, 1983, rewrote subdivision (b).

.1204 Continuances; Motions for

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S. 150A-24; Eff. February 1, 1976.

.1205 Subpoenas

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

History Note: Statutory Authority G.S. 150A-23; Eff. February 1, 1976.

.1206 Depositions and Discovery

(a) A deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N.C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a board hearing. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina Bar.

History Note: Statutory Authority G.S. 150A-11; Eff. February 1, 1976.

.1207 Reopening of a Case

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner or his attorney and made a part of the record of the hearing.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1300. LICENSES

.1301 Interim Permit for Comity Applicants

No license shall be issued to any comity applicant for admission under Rule .0502 of this Chapter except at the time of the annual licensing of the general applicants; provided, the board may at any other time, in its discretion, grant an interim permission to such comity applicants to practice law until license shall be issued.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1302 Licenses for General Applicants

Upon compliance with the rules of the board, and all orders of the board, the secretary, upon order of the board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the board in the form and manner as may be prescribed by the board, and at such times as prescribed by the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

SECTION .1400. JUDICIAL REVIEW

.1401 Appeals

Any person may appeal from an adverse ruling by the Board of Law Examiners. A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Law Examiners denying his application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1402 Notice

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1403 Record to Be Filed

Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising:

(1) the application and supporting documents or papers filed by the applicant with the board;

(2) a complete transcript of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

.1404 Wake County Superior Court

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Cited in In re Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

.1405 North Carolina Supreme Court

Any party to the review proceeding, including the board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the board.

History Note: Statutory Authority G.S. 84-24; Eff. February 1, 1976.

CASE NOTES

Cited in In re Elkins, — N.C. —, 302 S.E.2d 215 (1983).

Appendix IX-A. Rules Governing Practical Training of Law Students

(Approved by the Supreme Court March 14, 1973.)

Article
I. Purpose.
II. General Definition.
III. Eligibility.
IV. Form and Duration of Certification.
V. Supervision.
VI. Activities.
VII. Use of Student's Name.
VIII. Miscellaneous.

Editor's Note. — These rules were adopted by the Council of the North Carolina State Bar at its regular quarterly meeting in October, 1972, and approved by the Supreme Court March 14, 1973.

ARTICLE I — Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

ARTICLE II — General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic* — An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this State and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons* — A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid* — Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Third Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

E. *Lawyer* — Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

F. *Second Year Law Student* — A student regularly enrolled and in good standing in a law school in this State who has satisfactorily and substantially completed fifty percent (50%) of the requirements for a first professional degree in law (J.D. or its equivalent).

Effect of Amendments. — The amendment adopted by the Council of the North Carolina State Bar on April 15, 1977, and approved by the Supreme Court May 11, 1977, added subdivision F. The order amending this Article further provides "that these amendments be on a trial basis for one year commencing July 1, 1977."

ARTICLE III — Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in this State in a law school approved by the Council of The North Carolina State Bar.
B. A student regularly enrolled and in good standing in a law school in this State who has satisfactorily completed at least two thirds of the requirements for a first professional degree in law (J.D. or its equivalent).
C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.
D. Be introduced to the Court in which he is appearing by an attorney admitted to practice in that Court.
E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.
F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof.

Editor's Note. — The amendment adopted April 15, 1977, added a proviso to subdivision B, pertaining to participation by qualified second year law students. This provision has expired under its own terms, which provided that the amendment be on a trial basis for one year commencing July 1, 1977.

ARTICLE IV — Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the Office of The North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier. For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and *shall* be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any

showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

ARTICLE V — Supervision:

A supervising lawyer shall:

A. Be an active member of the State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law in North Carolina as a full time occupation for at least two years.

B. Supervise no more than five students concurrently.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared by such student for execution by any person or persons not a member or members of the State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.

2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

ARTICLE VI — Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provision of Section V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State, and local administrative bodies.

2. Civil litigation before Courts or Magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.

3. In any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of Court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with the consent of the District Solicitor.

D. When physically accompanied by the supervising attorney who has read, approved, and personally signed any briefs, pleadings, or other papers prepared by the student for presentment to the Court, a student may represent indigent clients in the following hearings or proceedings, provided however, the approval of the presiding Judge is first secured:

1. All juvenile proceedings.
2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court.
3. All misdemeanor cases.

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding Judge.

F. In all cases under this Rule in which a student makes an appearance in Court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in Court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the Jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

ARTICLE VII — Use of Student's Name:

A. A student's name may properly:

1. Be printed or typed on briefs, pleadings, and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings, or other similar documents.
2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student under the Supervision of . . . . . " (Supervising lawyer).

B. A student's name may not appear:

1. On the letterhead of a Supervising lawyer; or
2. On a business card bearing the name of a Supervising lawyer; or
3. On a business card identifying the student as certified under these rules.

ARTICLE VIII — Miscellaneous:

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:

APPLICATION OF . . . . . .

. . . . . .

. . . . . .

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR TO: THE NORTH CAROLINA STATE BAR:

The undersigned certifies as follows:

1. Name and address of person signing this certificate.

. . . . . .

2. Name and address of law school and official connection with same. . . . .

. . . . . .

3. . . . . is duly enrolled in the State of North Carolina in a law school approved by the Council of The North Carolina State Bar and is in good standing in said law school and has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).

4. . . . . is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules and Regulations Governing Practical Training of Law Students.

Seal (of School)

. . . . . ., Dean

. . . . . .

Name of School

. . . . . ., Dean of . . . . . Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me

this . . . . . day of . . . . . ., 19. . . .

. . . . . Notary Public

My commission expires

Form: Dean's Certificate

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:
APPLICATION OF . . . . . .
. . . . . .
. . . . . .

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North Carolina State Bar as to the eligibility for the above named individual to participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that . . . . . is no longer eligible to participate in said program.

Seal (of School)

. . . . . ., Dean
. . . . . .
Name of School

. . . . . ., Dean of . . . . . Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me
this the . . . . . day of . . . . . ., 19. . . .
. . . . . ., Notary Public.
My commission expires

Form: Withdrawal of Dean's Certificate

Appendix X. North Carolina Supreme Court Library Rules

General Provisions

Rule

2. Definitions.

Hours and Use of Library

3. Hours.

5. Use after Hours.

Services

11. Copy Service, Fees, and Certification.

Borrowing and Removing Material

Rule

13. Who May Borrow Material.

Appendix I

Official Register, State of North Carolina

General Provisions

2. Definitions.

Subject to additional definitions contained in subsequent sections and applicable to specific parts of these Rules, and unless the context otherwise requires, the following definitions shall apply for purposes of these Rules:

(f) "Official Register" means that list of positions of the State of North Carolina that is appended to these Rules as Appendix I.

Only Part of Rule Set Out. — As the rest of this rule was not changed by the amendment, only the introductory paragraph and subsection (f) are set out.

Effect of Amendments. — The amendment promulgated Nov. 28, 1972, rewrote subsection (f).

Hours and Use of Library

3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from nine o'clock in the morning until five o'clock in the afternoon and on Saturday, except during July and August, from nine o'clock in the morning until twelve o'clock noon.

Effect of Amendments. — The amendment promulgated July 24, 1980, inserted "except during July and August" near the end of this rule and made certain minor changes in wording throughout.

5. Use after Hours.

Only members and employees of the Supreme Court and the Court of Appeals may enter the Library or use the material or facilities of the Library when the Library is not open for public use.

Effect of Amendments. — The amendment effective April 14, 1975, added the last sentence of former subsection (c).

The amendment promulgated July 24, 1980, rewrote former subsection (b), which formerly read "Members of the North Carolina State

Bar, Inc., who have offices in the Justice Building," and deleted former subsection (c), relating to issuance, use and revocation of Library use permits.

The amendment effective Sept. 1, 1982, rewrote this rule so as to eliminate provisions for use of the Library by members of the North Carolina State Bar at certain times.

Services

11. Copy Service, Fees, and Certification.

The Library shall operate a copy service by means of which it shall furnish requested copies of all or portions of any Library material that legally may be copied, such copies to be furnished subject to the following terms and conditions:

(f) Patrons may make their own photocopies for ten cents ($.10) per page.

Only Part of Rule Set Out. — As the rest of this rule was not changed by the amendment, only the introductory language and subsection (f) are set out.

Effect of Amendments. — The amendment promulgated July 24, 1980, added subsection (f).

Borrowing and Removing Material

13. Who May Borrow Material.

The following persons only may borrow and remove material from the Library:

(f) The Secretary-Treasurer of the North Carolina State Bar, Inc.

Only Part of Rule Set Out. — As the rest of this rule was not changed by the amendment, only the introductory language and subsection (f) are set out.

Effect of Amendments. — The amendment promulgated July 24, 1980, rewrote subsection (f), which formerly read "the Secretary of the North Carolina State Bar, Inc., in person or upon his or her signed memorandum, as long as his or her office is in the Justice Building."

Appendix I.

OFFICIAL REGISTER, STATE OF NORTH CAROLINA

(1) The Senators, Representatives, Legislative Services Officer, Director of Legislative Drafting, and Director of Research for the General Assembly.

(2) The Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

(3) The Secretary of the Department of Administration, Secretary of the Department of Commerce, Secretary of the Department of Correction, Secretary of the Department of Crime Control and Public Safety, Secretary of the Department of Cultural Resources, Secretary of the Department of Human Resources, Secretary of the Department of Natural Resources and Community Development, Secretary of the Department of Revenue, and Secretary of the Department of Transportation.

(4) The Judges of the Superior Court and the Judges of the District Court.

(5) The District Attorneys and the Public Defenders.

(6) The State Librarian.

(7) The Director of the Division of Archives and History.
(8) The Director, Assistant Director, and Counsel of the Administrative Office of the Courts.
(9) The Chairman of the Judicial Standards Commission.
(10) The Secretary-Treasurer of the North Carolina State Bar, Inc.

Editor's Note. — This Appendix I was promulgated Nov. 28, 1972.

Effect of Amendments. — Appendix I was rewritten by amendment promulgated July 24, 1980.

Appendix XI. Comparative Tables

(4) TABLE OF LAWS CODIFIED SUBSEQUENT TO 1919

PUBLIC-LOCAL LAWS OF 1923

Ch.	Sec.	General Statutes
583	1-12	160A-349.1 to 160A-349.12

SESSION LAWS OF 1949

Ch.	Sec.	General Statutes
1077	1-6	143-273 to 143-278 note

SESSION LAWS OF 1951

Ch.	Sec.	General Statutes
87	. .	160A-349.13

SESSION LAWS OF 1953

Ch.	Sec.	General Statutes
899	. .	118-1 L.M.

SESSION LAWS OF 1955

Ch.	Sec.	General Statutes
904	1-5	143-329 to 143-333

SESSION LAWS OF 1957

Ch.	Sec.	General Statutes
269	1	58-7.1 to 58-7.3, 58-190, 95-4, 114-5, 114-13, 115-17, 116-53,
269	1	131-132, 136-11, 143-2, 143-11.1, 143-137, 143-227, 147-45, 147-58, 147-68

SESSION LAWS OF 1959

Ch.	Sec.	General Statutes
1073	4	7A-109 note

SESSION LAWS OF 1963

Ch.	Sec.	General Statutes
47	. .	143-129 L.M.
537	. .	7A-109 note, 14-409.1 note
707	5	115-69 note

SESSION LAWS OF 1965

Ch.	Sec.	General Statutes
517	. .	105-116

SESSION LAWS OF 1967

Ch.	Sec.	General Statutes
6	. .	7A-109 note, 14-409.1 note
122	. .	7A-109 note, 14-409.1 note
218	1	9-8 Repealed
470	. .	7A-109 note, 14-409.1 note
780	. .	143-129 L.M., 143-131 L.M.
903	. .	7A-109 note, 14-409.1 note
996	13	146-33
1049	5	7A-132, 7A-300, 7A-304, 7A-343, 7A-346
1049	6	7-44 Repealed, 7-45 Repealed, 7-68 Repealed, 7A-43.1 to 7A-43.3 Repealed, 7A-160 to 7A-165 Repealed
1244	1	14-113.7A
1272	3	105-116
1272	4	105-120

SESSION LAWS OF 1969

Ch.	Sec.	General Statutes
6	. .	7A-109 note, 14-409.1 note
109	. .	7A-109 note, 14-409.1 note
120	. .	118-1 L.M.
269	. .	113-126.2
276	. .	7A-109 note, 14-409.1 note
396	. .	7A-109 note, 14-409.1 note
521	. .	103-4
605	1, 2	106-567
616	1	58-72
616	2	58-79.2
658	. .	7A-109 note, 14-402 note, 14-409.1 note
796	. .	106-26
982	. .	14-320, 35-39, 48-2, 48-9,
9821	. .	48-9.1, 48-15, 48-16, 48-19, 48-20, 48-24, 48-25, 49-16, 51-2 note, 122-40, 122-49, 130-11, 130-58.1, 136-67, 143-280, 153-53.1, 153-52, 153-53.3, 153-53.4
1013	6	15-5.2 Repealed
1171	1-3	7A-41
1190	53	115-99 Repealed
1190	57	151-1 to 151-8 Repealed
1278	1	120-3
1278	2	120-4
1305	. .	7A-109 note, 14-409.1 note

SESSION LAWS OF 1971

Ch.	Sec.	General Statutes
1	1, 2	164-14
1	3	164-14 note
3	. .	14-250
4	. .	90-21.20, 90-21.21
5	. .	20-145
10	. .	90-220.11
11	. .	47-48
12	. .	1-54
13	1	84-20
13	2	84-26
14	. .	47-51
15	. .	20-36
16	. .	67-34 L.M.
17	. .	50-10
18	. .	84-34
19	. .	30-3
28	. .	160-453.12
30	. .	118-22
31	. .	14-314 Repealed
32	. .	147-13
33	. .	66-10 L.M.
34	. .	53-77.2 L.M.
35	. .	90-21.5
42	. .	20-81.3
44	. .	153-272 L.M.
46	. .	47-17.1
50	. .	163-1 L.M.

Ch.	Sec.	1971 General Statutes
54	1, 2	106-549.27
54	3	106-549.16
55	. .	20-166.1
56	. .	95-26 Repealed
57	. .	45-18
58	. .	143-291.1
59	. .	1-217.2
60	. .	55-158
61	. .	47-71.1
65	. .	118-7 L.M.
75	. .	9-21
76	. .	164-14
77	1	105-164.45 to 105-164.58 Repealed
77	2	105-463 to 105-468, 105-469 to 105-474
77	3	105-468.1
77	4	105-463 note
78	. .	20-156
79	1-3	20-141
80	1, 2	143-166
84	1	7A-171
84	2	7A-171 note
85	. .	115-36
86	1	93A-3
86	2	93A-6
86	3	93A-9
87	1	157-15
87	2	157-32.4
87	3	160-466
87	4	160-474.2
89	. .	105-164.14
90	1	115-36
90	2	115-36 note
99	. .	20-71
101	. .	52-8
106	. .	20-156
107	. .	20-51
109	. .	153-9
110	. .	14-365 Repealed
111	1	143-215.44 to 143-215.50
111	2	143-215.8
111	3	143-215.8 note, 143-215.44 note
115		12-4
116	1, 2	160-457.1
116	3, 4	157-4.1
117	1	135-1
117	2	135-1, 135-8
117	3-5	135-1
117	6-8	135-3
117	9	135-4
117	10	135-4, 135-8
117	11-15	135-5
117	16	135-18.1, 135-28
117	17	135-18.1
117	18	135-28
118	1, 2	135-3
118	3-7	135-5
118	8	135-3 note, 135-5 note
119	. .	1-539.1
120	1, 2	20-13
123	. .	118-1 L.M.
124		108-14
125	. .	14-111.2
128	. .	20-116
129	. .	113-100 L.M., 113-104 L.M.
131	1-4	113-78
132	. .	44-51.8
133	1	14-409.12
133	2	14-402, 14-409.1
134	. .	131-120
135	. .	164-11.9
136	. .	115-25 L.M.
138	. .	95-87
150	. .	129-33
151	. .	147-13
152	. .	20-9
153	. .	115-163
154	. .	49-10
156	. .	47-21
157	1, 2	48-2
158	. .	20-7
159	. .	1A-1, Rule 45
160	. .	111-20
162	. .	89A-4
163	. .	20-28.1
165	. .	14-399
167	1	147-26
167	1.1	147-26 note
168	. .	14-330 Repealed
169	1	113-111
169	2, 3	113-111 note
170	. .	163-1 note
171	1	97-10.2
171	2	97-10.2 note
174	. .	113-102 L.M.
175	1	130-13
175	2	130-14
177	. .	111-18
182	1-3	136-41.1
182	4	136-41.3
182	5	136-41.1 note, 136-41.3 note
183	. .	128-7.1
186	. .	153-9 L.M.
189	. .	163-106
190	1, 2	111-19
191	. .	130-87 to 130-93, 130-93.1 Repealed
192	. .	2-42 note, 7A-109 note, 14-402 note, 14-409.1 note
193	. .	148-26
196	1	55B-2
196	2	55B-14
197	. .	47-115.1
198	. .	20-3.1
200	. .	136-91
202	. .	3-1 to 3-8 Repealed
203	. .	14-111.2
204	. .	127-79

Ch.	Sec.	1971 General Statutes
208	1, 1½	20-17.1
218	1	143-127.1
218	2	14-322.2
218	3	50-13.8
218	4	14-322.2 note, 50-13.8 note, 143-127.1 note
219	1, 2	163-191
220	. .	14-247 L.M., 14-252 L.M.
221	. .	14-289 L.M.
225	. .	163-213.1 to 163-213.10
226	. .	20-179 note
229	1	10-12
229	2	10-12 note
230	. .	20-77
231	. .	75-28
235	1	1-42.2
235	2	1-42.2 note
239	1	90-255.1
239	2	90-255.1 note
240	. .	95-30 Repealed
242	. .	113-95
244	1	53-70
244	2	53-73
244	3	53-72, 53-74
246	1	87-1
246	2	87-9
246	3	87-10
246	4	87-14
246	5	87-15.1
248	. .	85A-34
257	. .	163-201
268	1	1-80
268	2	1-84
268	3	1-109
268	4	1-110
268	5	1-148
268	6	1-233
268	7	1-234
268	8	1-236.1
268	8.1	1-245
268	9	1-262
268	10	1-277
268	11	1-287.1
268	12	1-288
268	13	1-298
268	14	1-320
268	15	1-322
268	16	1-339.1
268	17	1-339.3
268	18	1-339.3, 1-339.3A, 1-339.8, 1-339.9, 1-339.10, 1-339.11, 1-339.18, 1-339.19, 1-339.20, 1-339.23, 1-339.26, 1-339.29, 1-339.32, 1-339.33, 1-339.38, 1-339.39
268	19	1-339.8
268	20	1-339.28
268	21	1-352
268	22	1-364
268	22.1	1-382
268	23	1-386
268	24	1-387
268	25	1-392
268	26	1-422
268	27	1-424
268	28	1-425
268	29	1-428
268	30	1-440.5
268	30.1	1-479
268	30.2	1-482
268	31	1-501
268	32	1-505
268	33	1-534
268	34	1-92 Repealed, 1-93 Repealed, 1-236 Repealed, 1-244 Repealed, 1-299 to 1-301 Repealed, 1-440.47 to 1-440.57 Repealed, 1-539.3 to 1-539.8 Repealed
269	1	6-1
269	2	6-4
269	3	6-7
269	4	6-14
269	5	6-17
269	6	6-18
269	7	6-33
269	8	6-40
269	9	6-47
269	10	6-48
269	11	6-49
269	11.1	6-50
269	12	6-53
269	13	6-60
269	14	6-62
269	15	6-2 Repealed, 6-5 Repealed, 6-6 Repealed, 6-8 to 6-12 Repealed, 6-16 Repealed, 6-27 Repealed, 6-34 to 6-39 Repealed, 6-41 to 6-46 Repealed, 6-52 Repealed, 6-54 to 6-56 Repealed, 6-58 Repealed, 6-59 Repealed, 6-61 Repealed, 6-63 to 6-65 Repealed
272	. .	53-86
274	. .	145-6
280	. .	129-4

Ch.	Sec.	1971 General Statutes
281	1	97-29
281	2	97-30
281	3	97-38
281	4	97-41
281	5	97-61.5
281	6	97-61.6
281	7	97-29 note, 97-30 note, 97-38 note, 97-41 note, 97-61.5 note, 97-61.6 note
282	1	113-95
282	2	113-95 note
283	. .	108-39
284	1	97-2
284	2	97-13
284	4	97-2 note, 97-13 note
285	. .	143-240
286	. .	105-164.14
289	. .	136-18
290	. .	115-125
291	. .	136-18
292	. .	136-18
293	. .	20-218
294	1	20-161
294	2	20-219.1 Repealed
295	. .	14-381
296	1, 2	75A-6
297	. .	69-25.16
298	1	105-116
298	2	105-120
298	3	105-213
299	. .	153-9 L.M.
300	. .	14-11.2
302	. .	14-247 L.M.
303	. .	85A-34
308	. .	118-1 note
309	. .	14-316
315	. .	130-210 note
316	. .	85A-34
319	1	53-77.1
319	2	53-77.2 Repealed
320	1	116-4
320	2	116-4.1
320	3	116-46
320	4	116-65
321	1	97-29
321	3	97-29 note
322	. .	97-37
323	. .	143-136
324	1, 2	14-117.2
324	3	14-117.2 note
325	1-4	128-21
325	5	128-23
325	6-8	128-24
325	9-11	128-26
325	12-16	128-27
325	17, 18	128-30
325	19	128-26, 128-27,
325	19	128-30
325	20	128-34
326	1, 2	128-24
326	3-7	128-27
336	. .	118-25
337	. .	14-249
338	1	135-1
338	2	135-5.1
338	3	135-5.1 note
339	. .	165-20
340	1	47-41.1
340	2, 3	47-41.1 note
341	1	153-53.7
341	2	153-53.7 L.M.
343	1	130-161.1
343	2-4	130-161.1 note
344	. .	15-104.1
345	1	136-42.1
345	2	136-42 transferred to 136-42.2, 136-42.2, 136-42.3, 136-43 transferred to 136-42.3
345	3	121-2
346	1	113-205
346	2, 3	113-205 note
347	. .	115-29 L.M.
348	1	111-35
348	2	111-35 note
349	1	111-24
349	2	111-25
350	. .	14-347 Repealed
351	. .	14-349 Repealed
352	. .	14-350 Repealed
353	. .	14-351 Repealed
354	. .	14-352 Repealed
355	1	88-14
355	2, 3	88-15
356	. .	115-37, 115-198, 115-204
357	. .	14-276 Repealed
361	. .	116-44.1
362	1	157-4
362	2-5	157-5
362	6, 7	160-458
362	8	160-459
362	9	160-460
363	1	2-2 transferred to 7A-100, 2-5 transferred to 7A-100, 2-6 transferred to 7A-100, 2-24 transferred to 7A-100, 2-25 transferred to 7A-100, 7A-100
363	2	2-10 transferred to 7A-102, 2-12 transferred to

Ch.	Sec.	1971 General Statutes
363	2	7A-102, 2-13 transferred to 7A-102, 2-15 transferred to 7A-102, 7A-102
363	3	2-16 transferred to 7A-103, 7A-103
363	4	2-17 transferred to 7A-104, 2-19 to 2-21 transferred to 7A-104, 7A-104
363	5	2-22 transferred to 7A-106, 7A-106
363	6	2-42 transferred to 7A-109, 7A-109
363	7	2-45 transferred to 7A-110, 7A-110
363	8	2-52 transferred to 7A-111, 2-53 transferred to 7A-111, 7A-111
363	9	2-54 to 2-56 transferred to 7A-112, 2-60 transferred to 7A-112, 7A-112
363	10	7A-105, 7A-107, 7A-108
363	11	2-1 Repealed, 2-3 Repealed, 2-4 Repealed, 2-7 to 2-9 Repealed, 2-11 Repealed, 2-14 Repealed, 2-16.1 Repealed, 2-16.2 Repealed, 2-18 Repealed, 2-23 Repealed, 2-26 Repealed, 2-27 Repealed, 2-29 to 2-41 Repealed, 2-43 Repealed, 2-44 Repealed, 2-46 to 2-51 Repealed, 2-57 to 2-59 Repealed
363	11.1	7A-105 note, 7A-107
366	1, 2	20-157
367	. .	96-8
368	. .	110-12
369	. .	108-9
370	. .	110-12
371	1, 2	130-173
371	3	130-176
371	4-7	130-177
371	8	130-178
371	9	130-179
374	1	20-37.6
374	2	20-37.6 note
377	1	8-85
377	1.1	7-448 transferred to 7A-400, 7-449 transferred to 7A-401, 7-450 transferred to 7A-402, 7-451 transferred to 7A-403, 7-452 transferred to 7A-404, 7-453 transferred to 7A-405, 7-454 transferred to 7A-406, 7-455 transferred to 7A-407, 7-456 transferred to 7A-408, 7A-400 to 7A-408
377	2	7A-6
377	3	7A-27
377	4	7A-40
377	5	7A-41
377	5.1	7A-61
377	6	7A-63
377	7	7A-133
377	8	7A-146
377	9	7A-213
377	10	7A-216
377	11	7A-222
377	12	7A-223
377	13	7A-247
377	14	7A-258
377	15	7A-271
377	16	7A-290
377	17	7A-292
377	18	7A-300
377	19-21	7A-304
377	22	7A-305.1
377	23, 24	7A-305
377	25	7A-306
377	26	7A-312
377	27	7A-314
377	28	7A-316
377	30	9-6
377	30.1	15-140
377	31	15-200
377	32	7-44 Repealed, 7-45 Repealed, 7-68 Repealed, 7-89 Repealed, 7-101 to 7-120 Repealed,

Ch.	Sec.	1971 General Statutes
377	32	7-121 to 7-239 Repealed, 7-243 to 7-296 Repealed, 7-384 to 7-447 Repealed, 7A-35 Repealed, 7A-67 Repealed, 7A-95, 7A-145 Repealed, 7A-252 Repealed, 7A-261 Repealed, 7A-275 Repealed, 7A-300, 7A-319 Repealed, 7A-400 note, 7A-452, 9-12, 15-183.1 Repealed
378	1-8	143-283.41 to 143-283.48
381	1	5-6
381	2	5-8
381	3	8-5
381	4	8-55
381	5	8-59
381	6	8-74
381	7	8-83
381	8	8A-1
381	9	11-2
381	10	11-7.1
381	11	11-11
381	12	1-7, 1-13, 1-174, 1-180.1, 1-272, 1-273, 1-279, 1-281, 1-283, 1-310, 1-321, 1-381, 1-382, 1-384, 1-385, 1-399, 1-403, 1-493, 1-500, 1-507.7, 1-507.8, 1-521, 8-63, 13-2, 13-3, 13-4, 13-6 to 13-10
381	13	8-75 Repealed
382	1	40-33
382	2	40-33 note
383	1, 1½	14-45.1
385	1	113-111
385	2	113-111 note
386	1	58-79
386	2	58-79.1
386	3	128-29
386	4	135-7
388	. .	143-247.1
391	. .	118-1 note
392	1	116-201
392	2	116-206
392	3	116-209.2
392	4	116-209.3
392	5-7	116-209.4
392	8	116-209.5
392	9	116-209.8
392	10	116-209.9
392	11	116-209.16 to 116-209.23
392	12	116-209.16 to 116-209.23 note
395	. .	48-4
396	. .	139-4
397	. .	105-11.1
400	1	113-103.1
400	2	113-103.1 note
401	1	20-17.1
402	. .	115A-20
403	. .	44A-2
405	1	14-190.1 to 14-190.8
405	2	14-190.1 note
405	3	14-190.1 note
405	4	14-189 Repealed, 14-189.1 Repealed, 14-192 Repealed, 14-193 Repealed
405	5	14-190.1 to 14-190.8 note
406	. .	163-117 note
408	. .	118-1 note
410	. .	7A-109 note, 14-402 note, 14-409.1 note
411	. .	14-404 L.M.
415	. .	50-8
416	. .	163-2
418	. .	47A-3
420	1	1-105 note, 1-105.1 note
420	2	1-105, 1-105.1
421	1	58-153
421	2	58-154
423	1	113-109
423	2	113-87
423	3	113-126.1
431	1	157-39.2
431	2	157-39.3
432	1, 2	7A-286
433	1-3	147-9.2 to 147-9.4
434	. .	115-146
435	. .	108-60
437	. .	20-13.1
439	1-3	113-104
444	1	101-2
444	2	101-5
444	3	130-37
444	4	130-45
444	5	130-62
444	6	130-69
444	7	130-202.1
444	8	130-63
446	1, 2	108-47
447	. .	113-202
448	. .	24-1.2
449	1	113-102
449	2	113-102 note
450	1	75A-10.1
450	2, 3	75A-10.1 note

Ch.	Sec.	1971 General Statutes
451	. .	7A-4.20 note, 7A-39.2 note, 7A-51 note
452	1	141-8
452	2	141-8 note
453	1	110-57.1
453	2	110-57.2 to 110-57.7
453	3	110-57.1 note
455	1	20-128
455	2	20-183.3
458	. .	165-22.1
460	1	20-84
460	1-1	20-84 note
461	. .	113-102
464	. .	143-286
465	. .	53-77.3
466	. .	54-20
467	. .	115-261 to 115-273 Repealed
468	. .	90-64
469	. .	143-117
470	1	122-35.18 to 122-35.22
470	2	122-35.18 note
471	1	122-63.1
471	2	122-63.1 note
474	1	106-227
474	2	106-230
475	. .	106-225.3
476	1, 2	58-176 note
477	1, 2	20-309
477	3	20-311
478	1, 2	20-183.3
480	1	121-7, 121-7.1
480	2	121-7.2 to 121-7.6
480	3	121-7.7, 121-7.7 note
480	4	121-8 to 121-8.3
480	5	121-13.1
480	6	121-13.2
480	8	121-7 note, 121-7.1 note, 121-7.2 note, 121-7.7 note, 121-7.8 note, 121-8 note, 121-8.1 note, 121-8.2 note, 121-8.3 note, 121-13.1 note, 121-13.2 note
481	. .	90-61
482	1	90-61.1
482	2	90-61.1 note
483	. .	120-2
485	. .	20-135.4
486	1	20-26
486	2	20-23
487	. .	54-22
488	. .	105-345 L.M.
489	. .	153-9
491	. .	85A-34
496	. .	14-111.2, 14-111.3
500	. .	97-88
508	1	7A-4.20
508	2	7A-39.2
508	3	7A-51
508	4	7A-4.20 note, 7A-39.2 note, 7A-51
508	5	7A-4.20 note, 7A-39.2 note, 7A-51 note
510	1	58-2
510	2	58-53.1
510	3	58-54.21
511	1	116-176
511	2	116-191
512	. .	20-77
513	1	58-124.1 to 58-124.11
513	2	58-124.11 note
513	3	58-124.1 note
515	1-4	113-105.2
515	5	113-105
516	. .	58-210
518	1	2-16.1 note, 2-16.2 note, 2-18 note
518	2	7A-107
523	1	108-42
523	2	108-43
524	. .	113-109
526	. .	106-419.1, 106-420.1
527	1	97-78
527	2	97-79
528	1	17-4
528	2	17-6
528	3	17-41
528	4	17-44
528	5	19-2
528	6	19-3
528	7	19-10
528	8	19-13, 19-15, 19-19
528	9	19-21 Repealed
528	10	19A-3, 19A-4
528	11	20-9
528	12	20-99
528	13	20-114
528	14	28-67
528	15	28-70
528	16	28-132
528	17	28-137
528	18	28-138
528	19	28-147
528	20	28-165
528	21	30-16
528	22	30-17, 30-19
528	23	30-20
528	24	30-21

Ch.	Sec.	1971 General Statutes
528	25	30-22 Repealed
528	26	30-30
528	27	30-31
528	28	31-11
528	29	31-33
528	30	32-17
528	31	35-2,
		35-4,
		35-4.1
528	32	35-20
528	33	35-44
528	34	36-4.1
528	35	38-3
528	36	39-5
528	37	40-19
528	38	40-20
528	39	41-11
529	1	1-352.1
529	3	1-352.1 note
530	. .	115-18 L.M.
532	1-4	113-28.13 to
		113-28.16
532	5	113-28.13 note
533	1	42-17
533	2	42-18
533	3	42-20
533	4	42-28
533	5-7	42-30 to 42-32
533	8-10	42-34 to 42-36
533	11	42-37 Repealed
534	. .	90-161
536	. .	58-77
537	. .	163-147
538	. .	1A-1 Rule 5
539	1	130-170.1
539	2	130-9
540	. .	146-26.1
542	. .	1A-1 Rule 55
544	1	44A-2
544	2	44A-5
544	3	44A-2 note,
		44A-5 note
545	1-23	74-46 to 74-68
546	. .	20-29.1
547	1	97-53
547	3	97-53 note
548	1, 2	97-113
548	3	97-114
549	. .	62-50
550	1	84-4.1
550	2	84-4.2
551	. .	62-134
552	1	62-118
552	2	62-247
553	. .	62-3
554		160-453.12 note,
		160-453.24 note
556	. .	7A-500
558	1, 2	76-13,
		76-14
562		15-162.1 note
563	. .	143-135.1
564	. .	14-401.11
565	. .	45-70
566	1	106-405.2
566	2	106-405.7
566	3	106-405.2 note,
		106-405.7 note
567	1, 2	106-403
568	. .	153-273
572	1	78-4
572	2	78-23
573	. .	157-5 L.M.
574	. .	143-219 note
575	. .	157-4 L.M.,
		157-5 L.M.,
		157-8 L.M.,
		157-27 L.M.
578	1	105-61.1
578	2	105-61.1 note
585	1	48A-1,
		48A-2
585	3	Ch. 48A note
586	1	62-281
587	1	143-48 to 143-52,
		143-52.1 Repealed,
		143-53 to 143-63,
		143-64 Repealed
588	. .	20-4.4
589	1, 2	20-81.1
590	1	7A-375 to 7A-377
590	2, 3	7A-375 note
591	1	14-190.9
591	2, 3	14-190.9 note
591	4	14-189.2 Repealed,
		14-190 Repealed,
		14-191 Repealed,
		14-194 Repealed
592	1	101-7
592	3	101-7 note
593	. .	143-131
594	. .	90-21.20 note,
		90-21.21
595	. .	153-9
596	. .	122-105 to 122-107
597	1	131-138 to 131-162
597	2	131-138 note
599	. .	157-4
601	. .	20-81.5
603	1	111-16
603	2	111-18
603	3, 4	111-30,
		111-31
604	. .	163-46
606	. .	105-296
607	. .	160-20.4
608	. .	118-1 note
610	. .	131-94 L.M.
614	. .	118-1 note
616	1	88-14,
		88-15
616	2	88-14
616	3	88-15
619	1, 2	20-138,

Ch.	Sec.	1971 General Statutes
619	1, 2	20-139
619	3-6	20-16.2
619	7	20-17
619	8-10	20-19
619	11	20-23.2
619	12, 13	20-139.1
619	15	20-179
620	. .	160-453.11 L.M., 160-453.12 note, 160-453.24 note
627	. .	14-289 L.M.
631	. .	97-61.6
632	. .	54-33.3
633	1	159A-1 to 159A-25
633	2-4	Ch. 159A note
634	1	62-3
634	2	116-41.2
634	3	62-3 note, 116-41.2 note
635	. .	116-44.1 note
636	. .	116-41.1, 116-41.2, 116-41.4
637	1	106-277.2
637	2-5	106-277.4 to 106-277.7
637	6	106-277.9
637	7	106-277.29
637	8	106-277.29 note
638	1	143-318.1 to 143-318.7
638	2, 3	143-318.1 note
639	. .	20-123
640	1, 2	115-159.1
641	1	41-11.1
641	2	41-11.1 note
642	1, 2	113-315.8, 113-315.9
643	. .	108-4
644	. .	115-240
645	. .	115-200
647	. .	115-34
648	1	113-102
648	2	113-102 note
649	. .	153-284 L.M.
650	. .	58-237.1
651	. .	105-4
652	1	75A-10.2
652	2	75A-10.2 note
653	1	162-16
653	2	1-313
655	. .	19-1
657	. .	161-14
658	. .	47-30
659	1	120-36.1 to 120-36.5
659	2	143-34.4
659	4	120-36.1 note, 143-34.3 note
660	. .	118-1 note
666	. .	153-266.6 L.M.
668	1	14-288.4
668	2, 3	14-288.4 note
669	. .	20-187.2
670	1	58-155.41 to 58-155.59
670	2	58-155.41 note
671	. .	136-33
672	. .	115-77
673	1, 2	96-4
673	3, 4	96-6
673	5-13	96-8
673	14-20	96-9
673	21	96-10
673	22-24	96-11
673	25, 26	96-12
673	27, 28	96-13
673	29	96-14
673	30, 30.1	96-15
673	31	96-18
674	. .	143-416 to 143-422
675	. .	163-106
676	. .	106-307.7
677	1	106-549.49
677	2, 3	106-549.50
677	4	106-549.51
677	5-23	106-549.52 to 106-549.69
677	24	106-549.49 note
677	25	106-549.51A
677	26	106-549.49 note
678	. .	20-72
679	. .	161-10.1
680	. .	20-116
685	1	120-34
685	2	120-32
685	3	147-54.1
688	. .	20-116
690	1	153-9
690	2, 3	160-200
690	4	113-265
690	5	136-102.5
690	6	153-9, 160-200
691	. .	148-28
697	1	128-1
697	2	128-1.1
697	3	128-2
697	4	128-1.1 note
698	1	160A-1 to 160A-5, 160A-11, 160A-12, 160A-16 to 160A-18, 160A-21 to 160A-23, 160A-60 to 160A-72, 160A-73 note, 160A-74 to 160A-82, 160A-101 to 160A-110, 160A-146 to 160A-152, 160A-155 to 160A-159, 160A-162 to 160A-167, 160A-171 to 160A-194, 160A-206 to 160A-214, 160A-216 to 160A-236, 160A-240 to 160A-262, 160A-266 to 160A-275, 160A-281 to 160A-288, 160A-291 to 160A-293, 160A-296 to 160A-307, 160A-311 to 160A-319,

Ch.	Sec.	1971 General Statutes
698	1	160A-321, 160A-322, 160A-331 to 160A-338, 160A-341 to 160A-348, 160A-350 to 160A-357, 160A-360 to 160A-365, 160A-371 to 160A-376, 160A-381 to 160A-392, 160A-401 to 160A-407, 160A-411 to 160A-438, 160A-441 to 160A-450, 160A-460 to 160A-465, 160A-470 to 160A-478, 160A-485 to 160A-490
698	2	122-95 note, 160-1 to 160-12 Repealed, 160-17 to 160-27 Repealed, 160-28.1 to 160-64 Repealed, 160-77.1 to 160-143 Repealed, 160-155 to 160-164 Repealed, 160-166.1 Repealed, 160-166.2 Repealed, 160-167 Repealed, 160-168 Repealed, 160-170 to 160-181.9 Repealed, 160-182 to 160-194 Repealed, 160-199 to 160-227 Repealed, 160-228 to 160-274 Repealed, 160-277 to 160-279 Repealed, 160-281 to 160-305 Repealed, 160-363.1 Repealed, 160-363.2 Repealed, 160-364 to 160-366 Repealed, 160-508 to 160-521 Repealed
698	3	153-250.1 to 153-250.13, 160-65 transferred to 153-250.1, 160-66 transferred to 153-250.2, 160-67 transferred to 153-250.3, 160-68 transferred to 153-250.4, 160-69 transferred to 153-250.5, 160-70 transferred to 153-250.6, 160-71 transferred to 153-250.7, 160-72 transferred to 153-250.8, 160-73 transferred to 153-250.9, 160-74 transferred to 153-250.10, 160-75 transferred to 153-250.11, 160-76 transferred to 153-250.12, 160-77 transferred to 153-250.13
698	4	153-368 to 153-382, 160-166.3 transferred to 153-368, 160-166.4 transferred to 153-369, 160-166.5 transferred to 153-370, 160-166.6 transferred to 153-371, 160-166.7 transferred to 153-372, 160-166.8 transferred to 153-373, 160-166.9 transferred to 153-374, 160-166.10 transferred to 153-375, 160-166.11 transferred to 153-376, 160-166.12 transferred to 153-377, 160-166.13 transferred to 153-378, 160-166.14 transferred to 153-379, 160-166.15 transferred to 153-380, 160-166.16 transferred to 153-381, 160-166.17 transferred to 153-382
698	5-7	Ch. 160A note
698	8	Ch. 160A note
699	. .	14-341 Repealed
700	. .	14-340 Repealed
701	. .	14-348 Repealed
702	1-3	153-9
703	1	58-9.3
703	2-4	58-9.4 to 58-9.6
703	5	7A-29
703	6	58-9.4 to 58-9.6 note
704	1	115-1
704	2	115-2
704	3	115-10
704	4	115-11
704	5	115-12
704	6	115-25
704	7	115-69
704	8, 9	115-98
704	10	115-100
704	11	115-101

Ch.	Sec.	1971 General Statutes
704	12	115-107
704	13	115-231
704	14	115-311
705	1, 2	113-95
705	3	113-130
710	1	110-115 to 110-122
710	2	8-53.1
710	3	8-57.1
710	4	108-4
710	5	108-19
710	6	14-318.2
710	7	14-318.3 Repealed
710	8	8-57.1 note, 110-115 note
711	1	1-352.2
711	2	1-352.2 note
712	1	130-240 to 130-248
712	2	130-240 note
715	. .	90-155
718	. .	14-197
724	. .	106-401
727	. .	7A-133
728	. .	143-34.3
736	1	62-316
736	2	62-300
736	3	62-266
737	. .	130-156.3
738	1-3	93-12
739	1	106-406
739	2	106-408
739	3	106-408.1
739	4	106-416
739	5	106-410
739	6	106-408.1 note
741	1	68-15 to 68-25
741	2	68-3 Repealed, 68-4 Repealed, 68-6 to 68-14 Repealed, 68-26 to 68-41 Repealed
743	1	153-6
743	2	153-6 note
744	1-4	116-158.1 to 116-158.4
745	. .	115-11
746	1	163-155
746	2	163-155 note
747	. .	84-5
748	. .	128-15.3
749	. .	20-42
750	. .	1A-1 Rule 26
751	. .	58-95
752	. .	58-96
753	1, 2	122A-7
755	1	90-22
755	2	90-29
755	3	90-29.4
755	4	90-30
755	5	90-31
755	6	90-34
755	7	90-36
755	8	90-39
755	9	90-41
755	10	90-41.1
755	11	90-43
755	12	90-48
756	1	90-221
756	2-8	90-223 to 90-229
756	9	90-229 note
756	10-14	90-230 to 90-233.1
757	1	58-9
757	2	58-39.4
757	3	58-40
757	4	58-40.6
757	5	58-42
757	6	58-51.2
757	7	58-52
757	8	58-52.1
757	9	105-228.7
757	10	58-40.6 note
762	1	116-11.1
762	2	116-11.1 note
763	1	20-166.1
763	2	20-279.4
763	3	20-279.5
764	. .	42-36.1
765	1, 2	14-32, 14-33
766	. .	44A-16
767	. .	20-17.1
768	1	87-16
768	2-4	87-21
768	5	87-22
769	. .	14-134.1
770	. .	153-102 L.M.
779	1	106-266.6 to 106-266.19, 106-266.20 Repealed, 106-266.21 Repealed
779	2, 3	106-266.6 note
780	1	159-1 to 159-5, 159-7 to 159-22, 159-24 to 159-38, 159-43 to 159-65, 159-72 to 159-76, 159-80 to 159-96, 159-121 to 159-139, 159-148 to 159-152, 159-161 to 159-165, 159-169, 159-170, 159-172, 159-176 to 159-178, 159-181, 159-182
780	2	153-69 to 153-73, 153-74 note, 153-75, 153-76, 153-77 note, 153-78, 153-79, 153-80 note, 153-81, 153-82 note, 153-83 to 153-101, 153-102 note, 153-103, 153-104 note, 153-105 to 153-107, 153-108 note, 153-109 to 153-113, 153-123 Repealed

Ch.	Sec.	1971 General Statutes
780	3	153-114 to 153-117 Repealed, 153-118 note, 153-119 Repealed, 153-120 note, 153-121 Repealed, 153-125 to 153-128 Repealed, 153-130 to 153-135 Repealed, 153-135.1 note, 153-136 to 153-142 Repealed
780	4	153-142.1 note, 153-142.2 note, 153-142.3 note, 153-142.4 note, 153-142.5 note, 153-142.6 note, 153-142.7 note, 153-142.8 note, 153-142.9 note
780	5	153-142.22 note, 153-142.23 note, 153-142.24 note, 153-142.25 note, 153-142.26 note
780	6	153-9, 153-29 to 153-32 Repealed
780	7	115-80.1 to 115-80.5 Repealed
780	8	153-143 to 153-147 Repealed
780	9	153-148 to 153-151 Repealed
780	10	160-62 to 160-64 note
780	11	160-290 note
780	12	160-367 to 160-408 Repealed
780	13	160-409 to 160-412.5
780	14	160-413 to 160-422 Repealed, 160-424 Repealed
780	15	160-424.1 to 160-424.8 Repealed
780	16	160-425 to 160-434 Repealed
780	17	160-497 to 160-507 Repealed
780	18	160-481
780	19	160-485 to 160-489, 160-493 Repealed
780	20	107-1 to 107-25 Repealed
780	21	131-101
780	22	131-92, 131-102 to 131-107 Repealed, 131-109 Repealed, 131-113 Repealed
780	23	131-114
780	24	131-14, 131-30, 131-35, 131-42 Repealed
780	25	130-215
780	26	130-216 to 130-219 Repealed
780	27	130-134
780	28	130-135 to 130-140 Repealed, 130-142 Repealed
780	29	130-28, 130-141
780	30	153-301
780	31	153-302 to 153-308 Repealed, 153-310 to 153-312 Repealed, 153-314 to 153-316 Repealed
780	32	162A-8
780	33	162A-10 Repealed
780	34	155-1 to 155-8 Repealed, 155-10 to 155-14 Repealed, 155-16 to 155-18 Repealed
780	35	108-56
780	36	142-15.1
780	37	98-19, 98-20 Repealed
780	37.1	157-4.2
780	37.2	160A-505.1
780	37.3	160A-349.1 to 160A-349.13
780	37.4	131-126.33A, 131-126.34A, 131-126.35 to 131-126.37 Repealed, 131-126.38A Repealed, 131-126.40 Repealed, 131-126.40B
780	37.5	162A-37, 162A-38 to 162A-44 Repealed, 162A-46 to 162A-48 Repealed, 162A-50 to 162A-52 Repealed
780	38-42	Ch. 159 note
781	. .	105-463 to 105-474 L.M.
782	. .	105-463 to 105-474 L.M.
792	. .	105-141
793	1, 2	20-16
794	. .	116-186
795	1-3	115A-14.1
796	1	25A-1 to 25A-44
796	2	Ch. 25A note
796	3	25A-45
797	1	65-13
797	2	65-14 to 65-15 Repealed
798	. .	163-106
799	. .	131-90 to 131-116.1

Ch.	Sec.	1971 General Statutes
800	. .	8-57
803	1	110-85 to 110-103
803	2	105-60
803	3	105-60 note, 110-85 note
804	1	141-7
804	2	141-7 note
805	1-3	113A-21 to 113A-23
806	1	105-271 to 105-328, 105-333 to 105-344, 105-347 to 105-395, 105-396 to 105-398 Repealed
806	2	105-32, 105-207, 105-249.3, 105-267.1, 105-268.1 to 105-268.3, 105-344 transferred to 105-249.3, 105-404 transferred to 105-32, 105-407 transferred to 105-267.1, 105-412 transferred to 105-207, 105-417.1 transferred to 105-268.1, 105-417.2 transferred to 105-268.2, 105-417.3 transferred to 105-268.3
806	3	105-399 to 105-403 Repealed, 105-405.1 Repealed, 105-406 Repealed, 105-408 to 105-411 Repealed, 105-413 to 105-417 Repealed, 105-418 to 105-421 Repealed, 105-422 Repealed, 105-423.1 to 105-429, 153-9
806	4	105-317 note, 153-9, 153-64.1
806	5	105-271 note, 105-341 Repealed, 105-342 Repealed, 105-343 Repealed
807	. .	163-151
808	. .	20-84.2
809	1	113-87
809	2	113-126.1
813	1	113-378
813	2	113-380
813	3, 4	113-382
813	5, 6	113-391
813	7	113-415
813	8	113-378 note, 113-380 note, 113-382 note, 113-391 note,
813	8	113-415 note
813	9	113-415 note
814	1-3	66-49.2
814	4-6	66-49.3
814	7, 8	66-49.4
814	9	66-49.5A
814	10	66-49.6
814	11-13	66-49.7
814	14	105-42
814	15	66-49.5A note
815	1-28	162A-31 to 162A-58
816	1-11	14-59 to 14-67.1
817	1	90-18
817	2	90-15
818	. .	1A-1 Rule 1
819	. .	86-22
820	1	105-130.5
820	2	105-130.12
820	3	105-125
823	. .	126-16
824	. .	113-15.2
825	. .	47-107
826	1, 2	86-15
826	3	86-15 note
827	. .	105-212
828	. .	15-6.3
829	1, 2	20-81.1
829	3	20-81.5
829	4	20-81.1
830	. .	7A-134
831	1	78-19
831	2	58-79.2
832	1	143-434 to 143-470
832	2	66-57
832	3	150-9
832	4	106-52 to 106-65.21 Repealed
832	5-9	143-434 note
833	1	105-116, 105-120.1, 105-125
833	2	105-120.1 note
835	1	163-279 to 163-304
835	2, 3	163-279 note
836	. .	90-220.10
837	1-5	135-1 note, 143-166 note
837	6	143-166
838	. .	143-476 to 143-482
839	. .	116-46.1B
840	. .	7A-133
841	. .	7A-133
842	. .	7A-133
843	. .	7A-133
844	. .	33-69.1
845	1-5	116-144 note
845	6	116-143
845	7-9	116-143.1
845	10	116-143
846	. .	115-166
847	. .	143-129
848	. .	20-187.1
849	1, 2	130-138

1971

Ch.	Sec.	General Statutes
854	. .	1-540.3
855	. .	1-42.2
856	. .	62-260
858	. .	130-14.1
860	. .	128-21 note, 160A-360 L.M.
861	1, 2	76-13, 76-14
863	. .	96-8
864	. .	10-1 note, 15-201 note, 18-37 note, 20-1 note, 20-183.16 note, 35-40 note, 35-70 note, 35-73 note, 53-92 note, 54-24.1 note, 54-74 note, 58-27.1 note, 58-224.1 note, 58-224.2 note, 58-262.1 note, 62-10 note, 65-19 note, 69-1 note, 69-16 note, 74-38 note, 74A-1 note, 75A-3 note, 75A-20 note, 76-1 note, 90-211 note, 94-1 note, 95-36.1 note, 95-64 note, 96-1.1 note, 97-77 note, 100-1 note, 102-9 note, 104D-1 note, 105-1 note, 105-269.2 note, 105-288 note, 105-450 note, 106-2 note, 106-22 note, 106-65.23 note, 106-266.7 note, 106-273 note, 106-407.1 note, 106-568.13 note, 108-1 note, 108-5 note, 108-61.1 note, 110-58 note, 111-1 note, 111-34 note, 112-1 note, 112-21 note, 113-1 note, 113-28.6 note, 113-44.1 note, 113-84 note, 113-241 note, 113-252 note, 114-10.1 note, 114-12 note, 115-151.10 note, 115-206.3 note, 115-244 note, 115-321 note, 115-336 note, 115-350 note, 115-352 note, 115A-3 note, 115A-39 note, 116-35 note, 117-1 note, 118-20 note, 119-26 note, 120-4.1 note, 121-1 note, 121-8 note, 121-19 note, 122-1 note, 122-1.1 note, 122-100 note, 122-105 note, 122-108 note, 122A-1 note, 125-1 note, 125-9 note, 125-16 note, 126-1 note, 127-14 note, 127-118 note, 128-22

1971

Ch.	Sec.	General Statutes
864	. .	note, 129-1 note, 129-31 note, 129-40 note, 129-50 note, 130-4 note, 130-186.1 note, 130-192 note, 131-1 note, 131-52 note, 131-61 note, 131-62 note, 131-77 note, 131-84 note, 131-117 note, 131-120 note, 131-127 note, 135-2 note, 135-20 note, 136-1 note, 137-31 note, 139-4 note, 140-1 note, 140-5.2 note, 140-6 note, 140-11 note, 140A-4 note, 143-48 note, 143-64.1 note, 143-136 note, 143-166 note, 143-171 note, 143-178 note, 143-199 note, 143-204.1 note, 143-204.5 note, 143-212 note, 143-214 note, 143-216 note, 143-230 note, 143-237 note, 143-255 note, 143-283.4 note, 143-283.11 note, 143-283.27 note, 143-283.28 note, 143-284 note, 143-319 note, 143-321 note, 143-334 note, 143-346 note, 143-360 note, 143-369.1 note, 143-370 note, 143-378 note, 143-392 note, 143-396 note, 143-403 note, 143-409 note, 143-416 note, 143-423 note, 143-429 note, 147-12 note, 147-87 note, 148-1 note, 148-51.1 note, 148-65.1 note, 148-89 note, 159-3 note, 163-19 note, 164-12 note, 165-1 note, 166-1 note, 167-1 note
864	1	143A-1 to 143A-11
864	2	143A-12
864	3	143A-13
864	4-16	143A-19 to 143A-170
864	17	36-3, 54-2, 54-6, 54-11 to 54-12.1, 54-14, 54-18.3, 54-18.5, 54-21.2, 54-21.4, 54-24 to 54-33.2, 54-35 to 54-40, 54-74, 54-75, 54-106, 105-228.26, 105-228.27, 143A-171 to 143A-185
864	18-20	143A-186 to 143A-238
864	21	143A-14 to 143A-18
865	. .	7A-133
866	. .	7A-133
867	1, 2	106-189.1

Ch.	Sec.	1971 General Statutes
867	3	106-189.1 note
870	1	162A-26 to 162A-30
870	2	162A-26 note
871	1	20-87.1
871	2	20-87.1 note
872	1	18A-1 to 18A-58
872	2	105-113.68 to 105-113.104
872	3	14-327 Repealed, 14-328 Repealed, 14-330 to 14-333 Repealed, 18-1 to 18-39.4 Repealed, 18-41 to 18-142 Repealed, 18-145 to 18-152 Repealed, 163-272 Repealed
872	4	15-27.1
872	5	18A-1 note, 18A-30 note, 18A-33 note, 105-113.68 note
873	1	90-220.1
873	2	90-220.4
875	1	14-291.2
875	2	14-291.2 note
876	. .	20-77
877	1, 2	7A-101
877	3	7A-172
879	1	45-21.44
879	2	45-21.44 note
880	1	44A-17 to 44A-23
880	1.1	44A-24
880	2	44-6 Repealed, 44-8 to 44-13 Repealed
880	4	44-6 note, 44-8 to 44-13 note, 44A-17 note, 44A-24 note
881	1, 2	138-6
881	3	138-7
882	1	143-143.1 Repealed
882	2	143-236.2 to 143-236.28 Repealed
882	3	153-267 to 153-271 Repealed
882	4	136-89.59 to 136-89.76 Repealed
882	5	82-1 to 82-18 Repealed
882	6	104C-1 to 104C-3 Repealed
882	8	113-14.2 Repealed
883	. .	115-67, 115-142, 115-144, 115-145
884	1	160-178.1, 160A-395
884	2	160-178.1 to 160-178.5, 160A-395 to 160A-399
884	4	160-178.1, 160A-395
884	5	160-178.3, 160A-397
885	1-13	157A-1 to 157A-13
885	14	121-7.1 Repealed
886	1, 2	54-41.1
887	1	105-164.4
888	. .	53-45
889	1	90-270.14
889	2, 3	90-270.11
892	1	162A-1 to 162A-6, 162A-8 to 162A-14, 162A-16 to 162A-25
892	2	162A-20 note
892	3	162A-20 note, 162A-25 note
893	1	143-291
893	2	143-297
893	3	143-291 note, 143-297 note
894	. .	62-3
895	. .	62-3
896	4	160-20.4 transferred to 160A-283, 160A-283 to 160A-289
896	5	160-199 to 160-203.1 note, 160A-491
896	6	160-181.11 to 160-181.15 transferred to 160A-451 to 160A-455, 160A-451 to 160A-455
896	7	160-178.1 to 160-178.5 transferred to 160A-395 to 160A-399, 160A-395 to 160A-399
896	9	160-195 to 160-198.5 transferred to 160A-6 to 160A-10, 160A-6 to 160A-10
896	10	160-199 to 160-203.1 note, 160A-17.1
896	11	160-199 to 160-203.1 note, 160A-492
896	13	160-205.2 transferred to 160A-243.1
896	15	160-199 to 160-203.1 note, 160A-302.1
896	16	160A-73 Repealed
897	. .	106-146
898	. .	7A-133
899	1	113-104
899	2	113-109
902	. .	13-1 to 13-3, 13-4 to 13-10 Repealed
903	2	128-21 note
905	1, 1.1, 1.2	120-4.1
908	. .	58-248.9
912	1	147-35, 147-55, 147-65
912	2	115-13

Ch.	Sec.	1971 General Statutes
912	3	114-7
912	4	106-11
912	5	95-2
912	6	58-6
913	. .	147-33
914	. .	118A-1 to 118A-7
916	. .	135-5.1
919	1	90-86 to 90-113.7, 90-113.9 to 90-113.13 Repealed
919	2	90-113.8
919	3, 4	90-86 note
920	. .	143-283.9
921	1-9	160-195 to 160-198.5 note
922	. .	143-471 to 143-475
923	. .	143-173
924	. .	20-309
925	. .	54-147
926	1	58-39.4
926	2	58-41.1
928	. .	105-349 L.M.
929	. .	14-258.1
931	1	105-344, 105-370 to 105-372
931	2	153-9, 153-64.1
932	1	105-277.1
932	3	105-277.1 note
933	. .	134-28.1
935	1	110-65 to 110-72
935	2	110-65
936	1	63-1 note, 63-10 Repealed, 63-29 Repealed
936	2	63-48 transferred to 63-1, 63-1
936	3	63-16 to 63-18
937	1, 1.5	160-200, 160A-17.1
938	. .	90-220.12 to 90-220.14
939	1	1-52
939	2	1-54 note
940	1, 2	130-16
942	. .	114-7.1
943	. .	8-53.4
945	. .	20-63
946	. .	115-315.7 to 115-315.12
947	1-5	163-227
948	1	58-26
948	2	58-26 note
949	. .	115-152.1
950	. .	58-40.2
951	. .	14-129
952	. .	20-87
954	1	14-415.1
954	2	14-415.2
954	3	14-415.1 note, 14-415.2 note
955	. .	15-186.1
956	1	7A-112
956	2	7A-308
957	. .	15-176.2
958	1	20-166
958	2, 3	20-166.1
960	. .	143-166.3
962	. .	1A-1 Rule 4
963	1-9	17A-1 to 17A-9
963	10	17A-1 note
967	. .	7A-286
968	. .	8-46
972	1-3	136-28.1 to 136-28.3
972	6	136-28 Repealed
976	1-3	35-73 to 35-74.1
976	4	35-75 to 35-77
976	5	143A-154
976	6	35-74.1 note
977	. .	136-18
984	1	122-16.1
984	2	122-16.1 note
985	. .	45-38
986	. .	20-162.2
988	1	105-201
988	2	105-201 note
989	. .	1-279
990	. .	105-164.13
993	. .	135-4
996	. .	105-141
997	. .	7A-41
1000	. .	115-336 to 115-342, 115-343 Repealed
1004	. .	153-9 L.M.
1009	1	135-32 to 135-36
1009	5	135-32 note
1013	1-8	71-13 to 71-20
1025	1	111-27.1
1025	2	126-5
1025	3	135-16.1
1025	4, 6	135-16.1 note
1027	1	130-236 to 130-239
1027	3	130-236 note
1052	. .	115-157
1054	1	105-9.1
1054	2	105-16
1054	3	105-17
1054	4	105-23
1054	5	105-9.1 note, 105-16 note, 105-17 note, 105-23 note
1055	1, 3	25-2-302
1058	. .	160-181.11 to 160-181.15 note, 160A-451 to 160A-455
1060	. .	160-464 L.M.
1061	1	116-187
1061	2	116-189
1063	1	153-5
1063	2	153-5 note
1064	1-4	106-496 to 106-499
1064	5, 6	106-500
1065	1, 2	50-8 note
1067	1	58-173.19
1067	2	58-173.3
1068	2	115-142.1
1068	4	115-142.1 note

Ch.	Sec.	1971 General Statutes
1069		161-22 L.M.
1070	1	20-43
1070	2	20-55
1070	3	20-56
1070	4	20-78
1071	1	115-142.2
1071	4	115-142.2 note
1072	. .	51-16
1074	. .	155-11
1076	1	160A-101
1076	2	160A-116 to 160A-127 Repealed
1076	3	160A-360
1078	. .	90-113.14
1079	. .	20-116
1080	1	58-44.4A
1080	2	57-12
1080	3	57-13
1083	1	147-11
1083	3	147-11 note
1085	1	81-36
1085	2	106-453
1086	1	116-158
1086	2	116-143
1087	1	105-149
1087	2	105-147
1087	3	105-147 note, 105-149 note
1090	. .	143-214
1092	. .	62-133
1093	1	55-137
1093	2	93D-6
1093	3	1-183.1
1093	5	153-375
1093	6	162A-4
1093	7	164-13
1093	9	150-9
1093	10	59-19
1093	11	105-269.2
1093	12	14-32
1093	13	48-7
1093	14, 15	1-440.7
1093	16	90-220.11
1093	17	1-394
1093	18	40-14
1093	18.1	163-2
1093	19	1-98.1 to 1-98.4 Repealed, 1-99.1 to 1-99.4 Repealed
1094	. .	115-102
1095	. .	115-85
1096	. .	115-101
1097	1	129-2 transferred to 143-336, 143-336
1097	2	129-4 transferred to 143-340, 143-340
1097	3	129-5 transferred to 143-341, 143-341
1097	4	129-6 to 129-9 transferred to 143-345.1 to 143-345.4,
1097	4	129-12 transferred to 143-345.5
1097	5	129-1 to 129-3 Repealed, 129-10 Repealed, 129-11 Repealed
1097	5.1	143-341 note
1099	. .	143-139.1
1100	1, 2	143-138
1100	3	143-138 note
1101	. .	1A-1 Rule 55
1102	1	136-119
1102	2	136-119 note
1103	1	143-295
1103	2	143-297
1103	3	143-298
1104	. .	136-156 to 136-166 note
1105	. .	136-19
1106	. .	136-99 to 136-101 Repealed
1107	1	133-5 to 133-17
1107	3	133-5 note
1108	1	97-53
1108	3	97-53 note
1109	1	116A-7.2
1109	2	116A-7.2 note
1110	1	116A-7.1
1110	2	116A-7.1 note
1111	1	116A-11
1111	2	116A-11 note
1113	. .	116A-4
1114	. .	113-105.2
1115	1-4	58-246 to 58-248.1
1115	6	58-246 note, 58-247 note, 58-248 note, 58-248.1 note
1116	1-3	120-31
1121	3	105-275
1121	4	105-333
1122	1, 2	24-1.2
1123	1-4	122-35.24 to 122-35.27
1123	5	122-35.24 note
1125	1	153-13
1125	2	153-13 note
1126	1	58-251.3
1126	2	58-251.3 note
1127	. .	90-211
1129	. .	7A-304
1130	. .	105-90
1131	. .	118B-1 to 118B-7
1132	. .	116-46.1A
1133	1, 2	20-179
1134	. .	110-23.1
1135	1	Ch. 116A
1135	2	116-20 to 116-25 transferred to 116A-1 to 116A-7, 116A-1 to 116A-7
1135	3	116A-8 to 116A-10
1135	4	53-20, 55-130
1136	1	55A-15
1136	2	36-23.2
1136	3	32-27

Ch.	Sec.	1971 General Statutes
1136	4	36-23.3
1137	. .	160-205.2, 160A-243.1
1138	1	139-16
1138	1A	139-3
1138	2	139-41
1138	3	139-47
1138	4	156-138.4
1138	5	139-47 note
1139	. .	138-5
1140	. .	122-38
1142	. .	14-322.2 note, 50-13.8 note, 143-127.1 note
1145	. .	62-50
1147	1	97-78
1147	2	97-79
1149	1	65-19
1149	2	65-20
1149	3	65-22
1149	4	65-24
1149	5	65-27
1149	6, 7	65-30
1149	8	65-34
1149	9	65-19 note, 65-20 note, 65-22 note, 65-24 note, 65-27 note, 65-30 note, 65-34 note
1150	1-3	90-9 to 90-11
1150	4	90-13
1150	5	90-15
1150	6	90-18
1151	. .	58-224.2
1152	. .	106-549.49 to 106-549.69 Repealed
1156	1	1A-1 Rule 7
1156	2	1A-1 Rule 4
1156	2.5	1A-1 Rule 5
1156	3, 4	1A-1 Rule 17
1156	4.5	1A-1 Rule 33
1157	1, 2	1-15
1158	. .	115-147
1159	1	143-215.62
1159	2	160-200, 160A-491
1159	3	153-9
1159	4	104B-16
1159	5	104B-10
1159	6, 7	113-229, 113-230
1159	8	113-229 note, 153-9 note
1160	. .	105-446.1
1161	. .	157-25
1162	1.1	105-278
1163	1.1	105-280
1164	. .	90-289 to 90-291
1165	. .	24-1.2
1166	1	163-32
1166	2	163-35
1166	3	163-56
1166	4	163-59
1166	5	163-70
1166	6	163-72
1166	7	163-73
1167	2	113A-30 to 113A-43
1167	3	143-215.51 to 143-215.61
1167	4	143-213
1167	5	143-215
1167	6	143-215.1
1167	7, 8	143-215.3
1167	9	143-215.63 to 143-215.69
1167	10	20-128.1
1167	11	113A-30 note, 143-215.51 note, 143-215.63 note
1167	12	20-128.1 note, 113A-30 note, 143-215.51 note, 143-215.63 note
1168	. .	24-10
1169	. .	134-1 to 134-28, 134-29, 134-30 to 134-114 Repealed
1170	. .	25-9-403
1171	. .	113-60.15
1172	1-8	143-145 to 143-151.1
1173	1, 2	50-5
1176	. .	97-13
1177	. .	120-1
1179	. .	97-40
1180	1-4	7A-286
1180	5	14-316.1
1180	6	110-22
1181	1	7A-305, 7A-306, 7A-307
1181	2	7A-232
1182	1	97-41
1182	3	97-41 note
1183	1-8	106-549.81 to 106-549.88
1183	9, 10	106-549.81 note
1184	1-6	116A-6.1
1185	1	43-5
1185	2	43-17.1
1185	3	44-8 to 44-13 note
1185	4	44-38
1185	5	44-47 Repealed
1185	6	44-48
1185	7	45-13
1185	8	46-8
1185	9	47-1
1185	10	47-4 Repealed
1185	11	47-7
1185	12	47-22
1185	13	47-32
1185	14	47-32.1
1185	15	47-44
1185	16	47-63
1185	17	48-5
1185	18	49-5
1185	19	49-7
1185	20	50-1 Repealed
1185	21	50-4
1185	22	50-7
1185	23	50-12
1185	24	50-13.5

Ch.	Sec.	1971 General Statutes
1185	25	50-16.8
1185	26	51-1
1185	27	51-16
1186	1, 2	58-56.1
1187	1-6	106-284.6 to 106-284.11
1188	1	115-44
1188	2	115-142
1189	11	97-86
1190	1-3	23-25 to 23-27
1190	4	23-34
1190	5	23-39
1191	1-5	143-347.1 to 143-347.5
1192	. .	62-260
1193	. .	122-61
1194	. .	7A-4.20
1195	. .	136-111
1196	. .	147-16.1
1197	. .	44A-2
1198	1, 2	20-16
1200	1-4	120-3.1
1200	5	120-3
1200	6	120-35
1200	7	143-8
1200	8	120-32
1200	9	120-3.1 note
1203	1-10	113A-1 to 113A-10
1203	11, 12	113A-1 note
1204	. .	58-54.25:1 Repealed
1205	1	20-279.1
1205	2	20-279.21
1205	3	20-279.34
1205	4	20-310
1205	5	58-248.8
1205	6	20-279.34 note, 20-310 note
1206	1	105-130.5
1206	2	105-147
1207	1, 2	160-200, 160A-492
1208	1	90-113.8A to 90-113.12
1208	2	90-113.8A note
1211	. .	90-188
1212	. .	53-172
1213	1	14-113.1
1213	2	14-113.5
1213	3	14-113.6A
1213	4	14-113.8
1214	. .	20-130.1
1215	1	111-15
1215	2	111-6.1
1215	3	111-11
1216	1	160-397 note
1218	1, 2	20-316
1219	1	143-433 to 143-433.5
1219	2	143-433 note
1220	. .	20-162.3
1221	1	105-446.3
1221	2	105-449.24
1221	3	105-446.3 note, 105-449.24 note
1222	1	129-17.1
1222	2	129-17.3
1223	1	105-130.6
1223	2	105-130.6 note
1224	. .	14-269.2
1225	. .	15-162.1 Repealed
1227	1, 1.1	122-71.4, 122-71.5
1228	. .	115-131 L.M.
1229	1	45-43.1 to 45-43.5 Repealed
1229	2	24-12 to 24-17
1229	3	24-12 note
1231	1	1-17, 1-371, 1-389, 7A-111, 9-3, 14-7.1, 14-198, 14-400, 20-10, 20-48, 31-32, 33-2, 33-25, 33-68, 33-71, 33-74, 35-44, 39-13.2, 46-12, 47-115.1, 48-2, 48-4, 48-8, 48-29, 48-36, 55-6, 55A-6, 58-41, 58-205.1, 66-11, 66-49.3, 83-8, 85A-4, 85A-11, 90-271, 90-272, 95-86, 96-8, 97-2, 105-249, 105-341, 108-24, 110-57, 113-48, 113-98, 113-276, 115-1, 130-190, 143-300, 162-2, 163-55, 163-73, 163-78, 163-86, 163-88, 165-18
1231	2	110-16 Repealed, 110-19, 110-64
1231	3	48A-3
1231	4	Ch. 48A
1234	1, 1.1	163-117 note
1235	. .	143-166
1236	. .	1A-1 Rule 12
1237	. .	163-117 note
1241	1	163-1 note
1241	2	163-106 note
1241	3	163-20 note, 163-30 note, 163-41 note, 163-106 note
1243	. .	7A-457
1244	1	116-1, 116-2, 116-2.1 Repealed, 116-3, 116-4, 116-4.1 Repealed, 116-5 to 116-11, 116-12 to 116-15, 116-27 Repealed, 116-31 to 116-36, 116-39.1 Repealed, 116-39.2 Repealed, 116-44 Repealed, 116-44.10 to 116-44.16 Repealed, 116-45 Repealed, 116-46 Repealed
1244	2	116-16
1244	3	116-46.2 transferred to 116-17,

1971

Ch.	Sec.	General Statutes
1224	3	116-17
1244	4	116-18, 116-158
1244	5	116-158.1 to 116-158.4 transferred to 116-19 to 116-22, 116-19 to 116-22
1244	6	116-11.1 transferred to 116-37, 116-37
1244	7	116-44.2 transferred to 116-38, 116-38
1244	8	116-39
1244	9	116-30 transferred to 116-40, 116-40, 116-40.1
1244	10	116-37.1 transferred to 116-40.2, 116-40.2 to 116-40.4, 116-46.3 transferred to 116-40.3, 116-46.4 transferred to 116-40.4
1244	11	116-42 to 116-42.4, 116-44.1 transferred to 116-42, 116-46.1 transferred to 116-42.1, 116-46.1A transferred to 116-42.2,

1973

Ch.	Sec.	General Statutes
1244	11	116-46.1B transferred to 116-42.3, 116-186 transferred to 116-42.4
1244	12	116-143
1244	13	116-64 to 116-66, 116-68, 116-70 Repealed, 116-70.1 Repealed
1244	14	90-113.3, 115-350, 116-49, 116-53, 116-57 to 116-59, 116-73, 116-154 to 116-157 Repealed, 116-158, 116-159 to 116-167 Repealed, 116-168, 116-190, 116-201, 116-209.19, 116-209.21, 126-4
1244	15	116-41.2, 116-41.4, 116-41.5, 116-41.8, 116-41.11
1244	16	116-41.1, 116-175, 116-187, 116-189
1244	17	116-26 transferred to 116-43, 116-43
1244	18	116-11 note
1244	20	116-5 note
1244	22	116-1 note

SESSION LAWS OF 1973

Ch.	Sec.	General Statutes
1	. .	50-4
2	. .	50-10
3	. .	105-472 L.M.
6	. .	7A-273
9	. .	7A-500
10	. .	42-30
12	. .	14-401.5
13	. .	84-24
16	. .	20-16
17	1, 2	20-16
18	1	20-17
18	2	20-30
19	. .	20-24
20	. .	45-18
23	. .	28-68
24	. .	67-13 note
27	. .	18A-8
28	. .	18A-15
29	. .	18A-20
30	. .	18A-34
32	. .	18A-51
33	. .	18A-52
34	. .	122-108 note
35	. .	163-11
37	. .	152-1 L.M.
38	1-7	106-418.1 to 106-418.7
38	8	106-418.1 note
39	. .	50-8
41	. .	8-52 Repealed
44	1	15-176.2 Repealed, 15-186.1 Repealed, 15-196.1 to 15-196.4
44	2	15-196.1 note
46		118-1 L.M.
47	1	7A-66.1
47	2	6-60, 6-62 7A-41, 7A-49.3, 7A-51, 7A-61, 7A-61 note, 7A-62, 7A-63, 7A-64, 7A-65, 7A-102.1, 7A-105, 7A-106, 7A-132, 7A-300, 7A-343, 7A-346, 7A-400, 7A-465, 7A-466, 8-74, 8-83, 12-3, 14-190.2,

Ch.	Sec.	1973 General Statutes
47	2	14-240, 14-291.2, 14-380.2, 15-10.2, 15-10.3, 15-200.1, 15-200.2, 15-221, 20-81, 105-289, 114-14, 122-8.1, 122-58.12, 130-200, 143-321, 163-106, 163-111, 163-177
48	. .	85A-34
49	1	105-4
49	2	105-4 note
50	. .	7A-375
51	1	105-8
51	2	105-8 note
52	. .	20-81.5
53	. .	103-4
54	. .	153-6
55	. .	145-7
56	. .	18A-33
57	1, 2	153-188, 153-189
57	3	153-190
57	4	153-194
57	5	153-181 Repealed, 153-185 Repealed, 153-186 Repealed
58	. .	20-135.4
59	. .	20-185
60	. .	47-14
61	. .	115-19 L.M.
63	. .	115-133.2 L.M.
65	. .	47-17.1
66	1	1-485
66	2-4	1-493 to 1-495
66	5	1-498
71	. .	20-28
72	. .	20-57
73	. .	20-7
74	. .	162-5
75	. .	1A-1, Rule 20
76	. .	47-30
80	. .	18A-22
81	. .	106-568.34
82	. .	7A-45
83	1, 2	9-2
84	. .	153-9 L.M.
85	. .	18A-17
86	. .	Ch. 159 note
87	. .	42-29
88	1, 2	20-305
88	3	20-305.1 to 20-305.4
88	4	20-305.5
89	. .	7A-10.1
90	. .	7A-217
91	. .	1A-1, Rule 62
92	1	90-18
92	2	90-6
93	1	90-158
93	2	90-162
93	3	90-167.1
93	4	90-170
94	. .	18A-28
95	. .	9-15
96	. .	106-465
97	. .	143A-181
98	1	54-75.1
98	2	54-75.1 note
99	1	120-32.1
99	2	120-32.1 note
99	3	120-32.1 note, 129-13 to 129-17 Repealed
99	4	129-17.1 to 129-17.5 Repealed
100	. .	163-153 note
107	. .	20-87
108	1	14-73.1
108	2	14-121
108	3	14-134
108	4	14-181 Repealed, 14-182 Repealed
108	5	14-230
108	6	14-232
108	7	14-239
108	8	14-240
108	9	14-245 Repealed
108	10	14-246
108	11	14-298
108	12	14-299
108	13	14-337 Repealed
108	14	26-1
108	15	26-3
108	16	26-6
108	17	42-19
108	18	54-32
108	19	54-166
108	20	58-236
108	21	62-65
108	22	66-2 Repealed
108	23	66-9
108	24	67-3
108	25	73-23 Repealed
108	26	76-11
108	27	76-18
108	28	76-25
108	29	76-37
108	30	76-50
108	31	76-67
108	32	80-25
108	33, 34	80-28, 80-29
108	35, 36	84-1, 84-2
108	37	84-3 Repealed
108	38	85-9
108	39	85A-22
108	41	95-4
108	42	95-52
108	43	96-10
108	44	98-3
108	45	98-6
108	46	98-14
108	47	103-3
108	48	104B-8

Ch.	Sec.	1973 General Statutes
108	49	105-22
108	50	105-24
108	51	105-109
108	52	105-375
108	53, 54	106-125, 106-126
108	55	106-284.5 to 106-284.13 note
108	56	106-459
108	57	109-25
108	58	109-30
108	59	109-34
108	60	109-36
108	61, 62	109-38, 109-39
108	63	112-28
108	64	113-50
108	65	113-55
108	66	113-92
108	68	120-11
108	69	120-16
108	70	120-44
108	71	122-16
108	72	122-22
108	73, 74	122-33, 122-34
108	75	122-43
108	76	122-60 to 122-65 note
108	77	122-65.6
108	78	122-84
108	79	122-87
108	80, 81	127-46, 127-47
108	82	128-16
108	83	128-20
108	84	135-20
108	85	136-109
108	86	139-18
108	87	139-21
108	88	143-215.5
108	89	143-215.15
108	90	148-59
108	91	150-30
108	92	152-7
108	93	152-10
108	94	156-10
108	95	156-15
108	96	156-75
108	97	156-134
108	98	162-14
108	99	161-24 Repealed, 162-6 Repealed, 162-7 Repealed
109	. .	130-14.2
110	. .	130-9
113	. .	90-289 to 90-291 Repealed
115	1	131-127, 131-130 note, 131-133
115	2	143A-151
116	1	116-143
116	2	116-143 note
118	1	47-72
118	2	47-72 note
119	1	113A-1 note
120	. .	14-197
121	. .	118-1 note
122	1	15-180.2
122	2	15-180.2 note
123	. .	136-44.1 note
123	1-3	136-44.12
123	4	136-44.1 note
125	. .	20-6
126	. .	20-37.6
128	. .	58-132
132	. .	7A-133
133	. .	39-13.4
135	. .	20-9
136	1	145-8
136	2	145-8 note
137	1	130-13
137	2	130-13 note
138	. .	90-65
139	. .	14-45.1
140	1	105-446.4
140	2	105-446.4 note
141	. .	105-307
142	. .	105-228.5
143	1-4	130-14
144	. .	36-32 note
145	. .	33-68
148	1	7A-66
148	2	7A-105
148	3, 4	7A-173
148	5	7A-466
148	6	7A-143 Repealed
149	. .	1A-1 Rule 38
151	1, 2	7A-451
151	3	7A-457
152	. .	130-18
153	. .	18A-33
154	1, 2	20-88
156	. .	105-382
159	. .	118-1 note
162	. .	115-29 L.M.
164	. .	160A-31 L.M.
165	. .	130-23
166	1, 2	161-29
168	. .	118-1 note
170	. .	160A-11
171	. .	163-285
172	1	96-8
172	2, 3	96-9
172	4	96-10
172	5	96-11
172	6	96-13
175	. .	62-260
176	. .	118-1 note
182	. .	15-12 note
183	. .	20-162.2
184	. .	163-79
185	. .	18A-17
186	. .	32-28
190	. .	160A-226 L.M.
191	1, 2	20-11
192	1, 2	55A-20
193	. .	136-41.3

Ch.	Sec.	1973 General Statutes
195	. .	14-401.5
196	. .	106-418.8 to 106-418.11, 106-418.11 note, 106-418.12 to 106-418.15
197	. .	165-22
198	. .	105-333
199	1-3	54-75
199	4-6	54-86 to 54-88
199	7	54-91
199	8-11	54-101 to 54-104
199	12	54-106
199	13	54-87.1
200	1	143-490 to 143-503
200	2-4	143-504 to 143-506
204	1	108-22 note, 108-29 to 108-37.1 Repealed
204	2	108-29 to 108-37.1 note
205	. .	105-98
206	1, 2	20-16.2
208	1-11	143-507 to 143-517
209	. .	118-1 note
211	2	113-104 note
213	. .	160A-364 L.M.
215	1	161-2
215	2	161-2 note
216	. .	118-1 note
217	. .	115-29 L.M.
219	. .	85A-34
228	. .	160A-146 L.M.
229	1-3	14-32
229	4	14-33
229	5	14-32 note, 14-33 note
230	1, 2	9-3
231	. .	105-364
233	. .	14-197
235	1	14-89.1
235	2	14-89.1 note
236	. .	115-153
238	1, 2	14-72
238	3	14-72 note
239	1	36-1
239	2	53-43.1
239	3	53-44.1
239	4	53-60
239	5	58-79
240	. .	7A-100
241	1, 2	135-3, 135-4
241	3-7	135-5
241	8, 9	135-6, 135-7
241	10	135-7.2
241	11	135-18.1
241	12	135-28
242	1	135-4
242	2-4	135-5
243	1	128-24
243	2	128-26
243	3-7	128-27
243	8, 9	128-28, 128-29
243	10	128-29.1
243	11	128-34
244	1-3	128-27
245	. .	116-144 note
248	. .	7A-4.20
249	. .	58-210
250	. .	1-38
251	. .	13-1 to 13-4
253	1-3	122-83 to 122-85
253	4	122-85.1
253	5, 6	122-86 note, 122-87
253	7	122-87.1
253	8, 9	122-88, 122-89
253	10	122-91
255	1	47B-1 to 47B-9
255	2	Ch. 47B note
256	1	88-19
256	2	88-21
256	3	88-25
261	. .	118-1 note
262	. .	55-14
263	. .	69-25.1 L.M., 130-124 L.M., 153-368 L.M.
267	. .	128-21 note
269	. .	7A-281
270	. .	7A-277
278	. .	160A-35 note
279	. .	108-14 L.M.
283	. .	47-17.1
285	. .	115-29 L.M.
287	. .	105-141
290	. .	105-275
291	. .	20-88
293	. .	106-225.3
294	. .	106-284.5 to 106-284.13 Repealed
295	1-27	95-126 to 95-152
295	29, 30	95-154, 95-155
295	31	95-126 note
301	. .	7A-16
302	. .	105-466
305	. .	153-284 L.M.
308	. .	160A-514 L.M.
312	1	20-16.3
312	2	20-16.3 note
313	. .	105-376 L.M.
314	1, 2	55A-12
314	3	55A-24.1
314	4	55A-42.1
314	5, 6	55A-44, 55A-44.1
314	7	55A-48
314	8	55A-68.1
314	10	55A-24.1 note, 55A-42.1 note, 55A-44.1 note
315	1	115-142
315	2	115-157.1
315	3	115-157.1 note
319	1	163-303 L.M.
319	2	15-21 L.M.
320	. .	118-1 note
321	. .	115-74.1 L.M.

Ch.	Sec.	1973 General Statutes
323	. .	50-13.6
330	. .	160A-146 L.M.
331	. .	160A-399.2 L.M.
335	. .	160A-24 note, 160A-44 note
336	. .	115-91 L.M.
338	. .	115-18 L.M., 115-19 note
339	. .	115-131 L.M.
342	. .	47-17.1
345	1, 2	58-251.4
345	3	58-251.4 note
346	. .	160A-514 L.M.
349	. .	115-19 L.M.
354	. .	152-1 L.M.
355	. .	105-322 L.M.
360	. .	118-1 note
367	. .	130-126 L.M.
372	1	62-3
372	2, 3	62-3 note
373	. .	7A-133
387	. .	139-39 L.M., 139-40 L.M.
389	1	143-442
389	2	143-452
389	3	143-360
389	4	143-453
389	5	143-452
389	6	143-461
389	7	143-442
392	1-17	113A-50 to 113A-66
392	18	113A-50 note
392	20	113A-50 note
411	. .	160A-388 L.M.
415	. .	160-299 L.M.
417	1, 2	7A-311
418	. .	118-1 note
421	. .	7A-109 note, 14-402 note, 14-409 note, 14-409.1 note
426	2	160A-5
426	3	160A-1
426	4	160A-7
426	5	160A-9.2
426	6	160A-9.4
426	7	160A-11
426	8	160A-17.1
426	9	160A-19
426	10	160A-22
426	11	160A-63
426	12	160A-64
426	13	160A-68
426	14, 15	160A-71, 160A-72
426	16, 17	160A-75, 160A-76
426	18	160A-79
426	19, 20	160A-101, 160A-102
426	21	160A-104
426	22	160A-148
426	23	160A-167
426	24	160A-176
426	25, 26	160A-184, 160A-185
426	27	160A-191
426	28	160A-195
426	29-31	160A-207 to 160A-209
426	32	160A-214
426	33	160A-217
426	34	160A-228
426	35	160A-237
426	36	160A-241
426	37	160A-243.1
426	38	160A-247
426	39	160A-252
426	40	160A-255
426	41	160A-258
426	42	160A-262 Repealed
426	42.1	160A-266, 160A-271
426	43	160A-270
426	44	160A-276
426	45	160A-281
426	46	160A-286
426	47	160A-299
426	48	160A-301
426	49	160A-302.1
426	50	160A-303
426	51	160A-312
426	52	160A-331
426	53, 54	160A-333, 160A-334
426	55	160A-353
426	56, 57	160A-360, 160A-361
426	58	160A-364
426	59	160A-372
426	60	160A-373, 160A-382, 160A-387, 160A-397, 160A-398, 160A-406, 160A-441, 160A-442, 160A-444, 160A-445, 160A-448
426	61	160A-376
426	62	157A-1 to 157A-13 transferred to 160A-399.1 to 160A-399.13, 160A-396, 160A-399.1 to 160A-399.5, 160A-399.5, 160A-399.6 to 160A-399.13
426	63	160A-451
426	64	160A-413
426	65	160A-417
426	66	160A-423
426	67	160A-425
426	68	160A-429
426	69	160A-430
426	70	160A-443
426	71, 72	160A-470, 160A-471

Ch.	Sec.	1973 General Statutes
426	73	160A-476
426	73.1	160A-493
426	74	160-445 to 160-453 transferred to 160A-24 to 160A-32, 160-453.1 to 160-453.24 transferred to 160A-33 to 160A-56, 160A-24 to 160A-56
426	75	160-454 to 160-474.2 transferred to 160A-500 to 160A-526, 160A-500 to 160A-526
431	. .	143-129 L.M.
435	. .	163-41
436	. .	57-3.2
437	. .	58-259.2
438	1	20-37.7
438	2	20-37.7 note
439	. .	20-13
440	. .	20-328
441	. .	20-9
442	. .	143-49.1
443	1-4	143-260.6 to 143-260.9
443	5	143-260.6 note
444	. .	130-166.21
445	. .	31-31.1
446	. .	115-39
447	. .	90-112
448	1	105-277.1
448	2	105-309
449	. .	89-2
450	1	88-10
450	2	88-12
450	3	88-25
450	4	88-30
451	. .	105-275
452	2-13	130-166.22 to 130-166.33
452	14, 15	130-166.22 note
454	1-2½	153-9, 153A-77
455	. .	122-35.20
456	. .	58-248.10
457	1, 2	14-72.1
458	. .	31-33
459	. .	45-12
460	. .	50-10
461	. .	148-52
462	2	131-76, 131-78, 131-78 note
462	3	131-78.1
463	. .	7A-278
464	1	8-51.1
464	2	28-173
464	4	8-51.1 note
465	1	1B-3
465	3	1B-3 note
466	1	14-363.1
466	2	14-363.1 note
467	. .	15-179
468	1, 2	105-149
469	1	55-3
469	2	55-7
469	3	55-14
469	4	55-16
469	5, 6	55-19, 55-20
469	7, 8	55-27, 55-28
469	9, 10	55-29
469	11	55-38
469	12	55-55
469	13	55-39
469	14-16	55-45 to 55-47
469	17	55-49
469	18-20	55-50
469	21, 22	55-65, 55-66
469	23-25	55-68
469	26-28	55-72
469	29	55-73
469	30	55-100
469	31, 32	55-106, 55-107
469	33	55-108.1
469	34	55-109
469	35	55-111
469	36, 37	55-113
469	38	55-113.1
469	39, 40	55-114
469	41	55-125.1
469	42	55-129
469	43	55-145
469	44	55-146.1
469	45	55-164.1
469	45.1	55-60
469	45.2	55-46
469	45.3	55-12
469	45.4	55-137
469	47	55-39 note, 55-55 note, 55-113.1 note, 55-125.1 note
470	1, 2	163-279 note
471	1, 2	130-160, 130-161
471	3	130-160 note, 130-161 note
472	1, 2	1-474, 1-474.1
472	2.1	1-484.1
473	1	18A-15
473	2	18A-15 note
474	2	159-3
474	3, 4	159-7
474	5, 6	159-8, 159-9
474	7-9	159-13
474	10, 11	159-14
474	12	159-15
474	13	159-17
474	14, 15	159-19, 159-20
474	16	159-22
474	17	159-24
474	18-20	159-25
474	21	159-27
474	22, 23	159-28
474	24, 25	159-30
474	26, 27	159-31, 159-32
474	28	159-33.1

Ch.	Sec.	1973 General Statutes
474	28.1	159-39
474	29	157-4.2
474	30	160A-505.1
474	31	160A-349.1 to 160A-349.13
475	1	122-55.1 to 122-55.7
475	2	122-36
475	3	122-46 Repealed, 122-47 Repealed
475	3½	20-17.1
475	4	122-55.1 note
476	1-5	143B-1 to 143B-5
476	6	143A-11, 143B-6
476	7-28	143B-7 to 143B-28
476	29-37	143B-49 to 143B-57
476	38	140-2, 140-3
476	39-42	143B-58 to 143B-61
476	43	140-5.2 Repealed
476	44-47	143B-62 to 143B-65
476	48	8-6, 8-7, 8-34, 66-58, 70-1 to 70-4, 97-24, 100-1 Repealed, 100-2, 100-3, 100-4, 100-5, 100-6, 100-7, 121-1, 121-1 note, 121-2 to 121-13, 121-13.1 Repealed, 121-13.2 Repealed, 121-14, 121-15, 121-16, 121-18, 121-23, 121-24, 121-25, 121-26, 121-27, 132-3, 132-4, 132-8, 132-8.1, 132-8.2, 136-42.1, 136-42.2, 136-42.3, 136-43.1, 143-31.2, 143-200, 143-268, 143-300, 147-45, 153-15.4, 160A-395, 160A-397, 160A-399.5
476	49-52	143B-67 to 143B-70
476	53	125-9, 125-10
476	54, 55	143B-71, 143B-72
476	56	121-19 Repealed
476	57, 58	143B-73, 143B-74
476	59	143-363 to 143-365 Repealed
476	60-63	143B-75 to 143B-78
476	64	115-205 note
476	65, 66	143B-79, 143B-80
476	67	143-409 Repealed, 143-410, 143-411, 143-412 to 143-414 Repealed
476	68, 69	143B-81, 143B-82
476	70	143-396 to 143-399 Repealed
476	71, 72	143B-83, 143B-84
476	73	140A-4 Repealed, 140A-5
476	74, 75	143B-85, 143B-86
476	77, 78	143B-87, 143B-88
476	79	143-403, 143-404 Repealed, 143-405 Repealed, 143-406, 143-407, 143-408 Repealed
476	80	143B-89
476	81	140-11 Repealed
476	82, 83	143B-90, 143B-91
476	84	125-1, 125-2, 125-3 Repealed, 125-4 Repealed, 125-5, 125-7, 125-8, 125-10, 125-14, 140-2, 143-138, 147-45
476	85, 86	143B-92, 143B-93
476	87	143-201, 143-204
476	88	143B-94
476	89	140-6 Repealed
476	90-93	143B-95 to 143B-98
476	95-98	143B-99 to 143B-102
476	100-103	143B-103 to 143B-106
476	105-108	143B-107 to 143B-110
476	110-114	143B-111 to 143B-115
476	116	143-204.1 to 143-204.7 Repealed, 143-369.1 to 143-369.3 Repealed, 143-429 Repealed, 143-430 Repealed, 143-431, 143-432, 143A-191 to 143A-230 Repealed
476	117-121	143B-136 to 143B-140
476	122-127	143B-141 to 143B-146
476	128	14-45.1, 18A-38, 20-9, 20-139.1, 42-39 note, 48-29, 51-9, 51-11, 66-58, 66-87, 66-88, 71-16, 72-34, 72-46, 72-47, 72-48, 72-48.1, 75A-6, 75A-21, 87-16, 87-52, 87-70, 87-88, 87-96, 88-23, 88-28, 88-28.1, 90-78, 90-80.1, 90-87, 90-88, 90-89, 90-90, 90-91, 90-92, 90-93, 90-94, 90-106, 90-113.2, 90-113.3, 90-172, 90-203, 90-205, 90-207, 90-211 Repealed, 90-212, 90-213, 90-214, 90-215, 90-233, 90-278, 90A-2, 90A-21, 90A-22, 90A-23, 90A-24, 90A-25, 90A-28, 90A-40, 97-61.1, 104C-4, 104C-5,

Ch.	Sec.	1973 General Statutes
476	128	105-113.78, 105-113.85, 105-275, 106-139, 106-143, 106-168.5, 106-173.5, 106-266.6, 106-266.17, 106-364, 106-365, 106-379, 106-383, 110-87, 110-91, 110-92, 113-17, 113-132, 113-202, 113-229, 113-415, 113A-113 note, 113A-118, 115-132, 115-143, 115-200, 115-204, 122-7.1, 122-7.2, 122A-4, 127-23, 130-1, 130-3, 130-4 to 130-8 Repealed, 130-9, 130-10, 130-11, 130-12 Repealed, 130-14, 130-14.2, 130-17, 130-18, 130-19, 130-24, 130-25, 130-26, 130-30, 130-31, 130-32, 130-33, 130-35, 130-36, 130-37, 130-45, 130-46 note, 130-48, 130-49, 130-52, 130-55, 130-58.1, 130-66, 130-67, 130-72, 130-73, 130-81, 130-82, 130-83, 130-84, 130-85, 130-86, 130-87, 130-88, 130-95, 130-96, 130-97, 130-99, 130-102, 130-103, 130-108, 130-109, 130-110, 130-112, 130-113, 130-118, 130-121, 130-123, 130-124, 130-125, 130-126, 130-128, 130-131, 130-133, 130-148, 130-149, 130-150, 130-151, 130-151.1, 130-152 note, 130-152.1 note, 130-152.2 note, 130-153 note, 130-154 note, 130-156.3, 130-156.4 note, 130-157, 130-159, 130-160, 130-161, 130-161.1, 130-163, 130-165, 130-166, 130-166.7, 130-166.12, 130-166.14, 130-166.15, 130-166.17, 130-166.18, 130-166.19, 130-166.20, 130-166.21, 130-166.25, 130-166.31, 130-167, 130-169.01, 130-169.02, 130-169.03, 130-169.04, 130-169.05, 130-169.06, 130-169.2, 130-169.3, 130-169.4, 130-170, 130-170.1, 130-172, 130-173,
476	128	130-174, 130-175, 130-176, 130-177, 130-178, 130-180, 130-181, 130-182, 130-183, 130-184, 130-184.1, 130-184.2, 130-185, 130-187, 130-188, 130-189, 130-190, 130-192, 130-193, 130-194 Repealed, 130-195 Repealed, 130-196, 130-197, 130-199, 130-200, 130-201, 130-202, 130-203, 130-204, 130-205, 130-206, 130-207, 130-208, 130-209, 130-211, 130-212, 130-213, 130-214, 130-220, 130-230, 130-231 Repealed, 130-232, 130-233, 130-235, 130-236, 130-237 Repealed, 130-238, 130-239, 130-241, 130-242, 130-243, 130-244, 130-245, 130-246, 131-27, 134-25, 139-47, 143-138, 143-215.1, 143-215.7, 143-215.26, 143-280, 143-347, 143-347.2, 143-356, 143-357, 143-392, 143-436, 143-439, 143-472, 143B-192 to 143B-195, 147-33.2, 147-45, 148-10, 153-9, 153-53.3, 153-53.4, 153-166, 153A-225, 156-69, 159-95, 159A-3, 162A-21, 162A-23, 162A-24, 162A-25, 162A-30, 162A-33, 162A-34, 162A-35
476	129-132	143B-147 to 143B-150
476	133	14-322.2, 18A-15, 18A-15 note, 35-70 to 35-72 Repealed, 50-13.8, 96-8, 105-279, 110-87, Ch. 122 note, 122-1, 122-1.1 Repealed, 122-1.2, 122-1.3 to 122-1.6 Repealed, 122-2 Repealed, 122-2.1 Repealed,

Ch.	Sec.	1973 General Statutes
476	133	122-3, 122-4, 122-7, 122-7.1, 122-7.2, 122-8.1, 122-8.2, 122-9 Repealed, 122-11 Repealed, 122-11.4, 122-11.6, 122-12, 122-13, 122-13.1, 122-16, 122-16.1, 122-17 Repealed, 122-19, 122-25, 122-28, 122-31, 122-32, 122-34, 122-35, 122-35.1, 122-35.2, 122-35.3, 122-35.4, 122-35.6, 122-35.7, 122-35.8, 122-35.12, 122-35.12A, 122-35.13, 122-35.14, 122-35.16, 122-35.17, 122-35.18, 122-35.19, 122-35.20, 122-35.21, 122-35.24, 122-35.25, 122-35.26, 122-35.27, 122-38, 122-39, 122-40, 122-53, 122-60 to 122-65 note, 122-65.8, 122-69, 122-70, 122-71, 122-71.1, 122-71.4, 122-71.5, 122-71.6, 122-72, 122-73, 122-74, 122-80, 122-83, 122-92, 122-93, 122-94, 122-95, 122-96, 122-98, 122-98.1, 122-100, 122-108 Repealed, 122-109, 122-110 Repealed, 122-111 Repealed, 143-126, 143-126.1, 143-127.1, 143-280, 143-472, 148-19, 148-49.7
476	133.1, 133.2	143B-151, 143B-152
476	133.3	35-39, 35-40 Repealed, 35-40.1, 35-41, 35-42, 35-43 to 35-48, 35-50, 35-53, 35-55, 35-57
476	134-137	143B-153 to 143B-156
476	138	14-320, 15-155.1, 15-155.2, 15-206, 48-2, 48-9.1, 48-15, 48-16, 48-19, 48-20, 48-22, 48-24, 48-25, 71-16, 94-2, 108-1 to
476	138	108-6 Repealed, 108-7, 108-8, 108-9, 108-11, 108-15, 108-19, 108-22, 108-23, 108-24, 108-25, 108-26, 108-27, 108-28, 108-39, 108-39.1, 108-40, 108-41, 108-42, 108-43, 108-44, 108-45, 108-50, 108-51, 108-52, 108-53, 108-54, 108-55, 108-56, 108-57, 108-58, 108-59, 108-60, 108-61.1 Repealed, 108-61.2, 108-63, 108-65, 108-66, 108-68, 108-69, 108-70, 108-71, 108-73, 108-74, 108-76, 108-77, 108-78, 108-79, 108-80, 108-81, 110-24, 110-49, 110-50, 110-51, 110-52, 110-55, 110-56, 110-57.1, 110-57.3, 110-87, 110-92, 110-119, 110-122, 111-30, 111-31, 122-7.1, 122-7.2, 122-40, 130-11, 134-1, 134-23, 136-67, 143-138, 143-280, 143-472, 147-45, 148-9 Repealed, 148-33.1, 153-9, 153-50, 153-51, 153-52, 153-53.1, 153-53.3, 153-53.4, 153-53.5, 153-154, 153-166, 153-168, 153-175, 153A-225
476	139-142	143B-157 to 143B-160
476	143	66-58, 105-149, 105-164.13, Ch. 111 note, 111-1 to 111-3 Repealed, 111-4, 111-5, 111-6, 111-6.1, 111-7, 111-8, 111-8.1, 111-9 Repealed, 111-10 Repealed, 111-12 Repealed, 111-12.1, 111-12.2, 111-12.3, 111-12.4 Repealed, 111-12.5, 111-12.6, 111-13, 111-14, 111-16, 111-17, 111-18, 111-19, 111-20, 111-24, 111-25, 111-27, 111-27.1, 111-27.2, 111-28, 111-28.1, 111-29, 111-34 Repealed, 113-271, 126-5, 135-16.1, 147-45, 163-152.1
476	144-151	143B-161 to 143B-168

Ch.	Sec.	1973 General Statutes
476	152	90-271, 96-8, 122-72.1, 131-117 Repealed, 131-118 Repealed, 131-120, 131-121, 131-121.3, 131-123, 131-124, 131-125, 131-126, 131-126.1, 131-126.3, 131-126.4, 131-126.5, 131-126.6, 131-126.7, 131-126.9, 131-126.10 Repealed, 131-126.11 Repealed, 131-126.12, 131-126.13 Repealed, 131-126.14, 131-126.16, 131-126.17 Repealed, 131-126.25, 131-126.31, 131-126.32, 131-126.33A, 131-138, 131-140, 131-141, 131-142, 131-143, 131-144, 131-147, 131-148, 131-149, 131-150, 131-152, 131-155, 131-156, 131-157, 131-158, 131-159
476	153-160	143B-169 to 143B-176
476	161	131-52 Repealed, 131-53 Repealed, 131-54, 131-55, 131-56, 131-57, 131-59 Repealed, 131-62 to 131-71 Repealed, 131-58, 131-72, 131-74, 131-75 Repealed, 131-77, 131-78 Repealed, 131-79 Repealed, 131-81, 131-82 Repealed, 131-83, 131-84, 131-85, 131-86, 131-87
476	162	131-128 Repealed, 131-129, 131-130 Repealed, 131-131, 131-132, 131-133, 131-134, 131-135, 131-136 Repealed
476	163	131-1 Repealed, 131-2, 131-3
476	164	115-321, 115-322 to 115-324 Repealed, 115-325, 115-326, 115-327, 115-328, 115-329 Repealed,
476	164	115-330, 115-331 to 115-333 Repealed, 115-336, 115-337 to 115-339 Repealed, 115-340, 115-342
476	165	122-16
476	166	112-2 Repealed, 112-3, 112-4 Repealed, 112-6 Repealed
476	167-169	143B-177 to 143B-179
476	170	35-73 to 35-77 Repealed
476	171, 172	143B-180, 143B-181
476	173	143-283.11 to 143-283.23 Repealed
476	174, 175	143B-182, 143B-183
476	176	122-105 to 122-107 Repealed
476	177, 178	143B-184, 143B-185
476	179	143-283.1, 143-283.2, 143-283.3, 143-283.4 to 143-283.6 Repealed, 143-283.7, 143-283.8, 143-283.9 Repealed, 143-283.10 Repealed
476	180, 181	143B-186, 143B-187
476	182	110-65, 110-67 to 110-70 Repealed, 110-71, 110-72 Repealed
476	183	130-186.1 Repealed, 130-186.2, 130-186.3 Repealed, 143-346 Repealed, 143-347, 143A-130 to 143A-162 Repealed
476	184-192	143B-217 to 143B-225
476	193	7A-110, 18A-2, 18A-43, 20-1, 28-56.3, 53A-15, 55-119, 55-121, 55-150, 55A-72, 66-20, 84-34, 93-12, 102-13, 105-3, 105-10, 105-11, 105-11.1, 105-12, 105-16, 105-17, 105-19, 105-20, 105-21, 105-22, 105-23, 105-24, 105-25, 105-26, 105-27, 105-28, 105-29, 105-31, 105-33, 105-34, 105-35, 105-36, 105-36.1, 105-37,

Ch.	Sec.	1973 General Statutes
476	193	105-37.1, 105-38, 105-39, 105-41, 105-41.1, 105-42, 105-43, 105-44, 105-45, 105-46, 105-47, 105-48, 105-49, 105-51, 105-52, 105-53, 105-54, 105-55, 105-56, 105-57, 105-58, 105-61, 105-61.1, 105-62, 105-64, 105-64.1, 105-65, 105-65.1, 105-66, 105-67, 105-68, 105-69, 105-70, 105-71, 105-72, 105-74, 105-75, 105-76, 105-77, 105-78, 105-79, 105-80, 105-82, 105-83, 105-84, 105-85, 105-86, 105-87, 105-88, 105-89, 105-89.1, 105-90, 105-90.1, 105-91, 105-92, 105-93, 105-96, 105-97, 105-98, 105-99, 105-100, 105-102, 105-102.1, 105-102.2, 105-104, 105-107, 105-109, 105-111, 105-112, 105-113, 105-113.4, 105-113.7, 105-113.9, 105-113.10, 105-113.11, 105-113.13, 105-113.15 to 105-113.19, 105-113.21 to 105-113.26, 105-113.30, 105-113.31, 105-113.34, 105-113.36, 105-113.37, 105-113.40, 105-113.44, 105-113.45, 105-113.47, 105-113.48, 105-113.50 to 105-113.56, 105-113.56A, 105-113.57 to 105-113.59, 105-113.63, 105-113.65, 105-113.67, 105-113.68, 105-113.70, 105-113.73, 105-113.75, 105-113.76, 105-113.81, 105-113.83, 105-113.84, 105-113.86, 105-113.88, 105-113.89, 105-113.91, 105-113.92, 105-113.98, 105-113.101 to 105-113.103, 105-115, 105-116, 105-117, 105-118, 105-119, 105-120, 105-120.1, 105-121.1, 105-122, 105-123, 105-125, 105-127, 105-128, 105-129, 105-129.1, 105-130.2, 105-130.4, 105-130.6, 105-130.7, 105-130.10 to 105-130.12,
476	193	105-130.14 to 105-130.21, 105-135, 105-141, 105-141.1, 105-142, 105-144.1, 105-145, 105-146, 105-147, 105-149, 105-151, 105-152, 105-154, 105-155, 105-156, 105-157, 105-159, 105-161, 105-162, 105-163.1 to 105-163.3, 105-163.5 to 105-163.11, 105-163.13 to 105-163.18, 105-163.22, 105-163.23, 105-163.25 to 105-163.28, 105-163.30, 105-163.32, 105-163.33, 105-163.37, 105-164.3 to 105-164.7, 105-164.9 to 105-164.11, 105-164.14 to 105-164.25, 105-164.28 to 105-164.32, 105-164.35, 105-164.37 to 105-164.41, 105-164.43, 105-164.44, 105-191, 105-195, 105-196, 105-199, 105-205, 105-206, 105-209, 105-210, 105-212, 105-213, 105-217, 105-228.2, 105-228.9, 105-228.16 to 105-228.20, 105-228.27, 105-228.31, 105-228.32, 105-228.36, 105-230, 105-231, 105-232, 105-233, 105-235, 105-236, 105-237, 105-237.1, 105-239, 105-239.1, 105-240, 105-240.1, 105-241.1, 105-241.2, 105-241.3, 105-241.4, 105-242, 105-243, 105-244, 105-244.1, 105-245, 105-250.1, 105-251, 105-252, 105-253, 105-254, 105-255, 105-256, 105-257, 105-258, 105-259, 105-260, 105-261, 105-262, 105-263, 105-264, 105-266, 105-266.1, 105-267, 105-268.1, 105-268.2, 105-269, 105-269.1, 105-269.2, 105-286,

Ch.	Sec.	1973 General Statutes
476	193	105-288 to 105-291, 105-292 Repealed, 105-293 Repealed, 105-294, 105-299, 105-301, 105-303, 105-304, 105-305, 105-309, 105-311, 105-312, 105-313, 105-317, 105-318, 105-319, 105-320, 105-321, 105-322, 105-324, 105-325, 105-327, 105-328, 105-334, 105-335, 105-336, 105-337, 105-338, 105-339, 105-340, 105-341, 105-342, 105-343, 105-344, 105-360, 105-433, 105-434, 105-435, 105-436, 105-438, 105-439, 105-441, 105-442, 105-444, 105-446, 105-446.1, 105-446.3, 105-447, 105-448, 105-449, 105-449.01, 105-449.2, 105-449.3, 105-449.4, 105-449.5, 105-449.6, 105-449.7, 105-449.8, 105-449.9, 105-449.10, 105-449.12, 105-449.13, 105-449.14, 105-449.15, 105-449.17, 105-449.19, 105-449.20, 105-449.21, 105-449.23, 105-449.25, 105-449.28, 105-449.29, 105-449.30, 105-449.31, 105-449.32, 105-449.34, 105-449.35, 105-449.36, 105-449.37, 105-449.39, 105-449.40, 105-449.42, 105-449.45, 105-449.46, 105-449.47, 105-449.48, 105-449.49, 105-449.50, 105-449.51, 105-449.52, 105-450 to 105-452 Repealed, 105-453, 105-454 Repealed, 105-455, 105-456, 105-457 Repealed, 105-459, 105-461, 105-462, 105-466, 105-468, 105-469, 105-470, 105-471, 105-472, 105-473, 105-474, 143A-186 to 143A-190 Repealed, 147-45, 159A-3
476	194	122-71.6 note,
476	194	Ch. 143B note
478	. .	20-51
479	. .	47-71.1
480	. .	44-68.5
483	. .	7A-133
484	. .	105-275
487	. .	153-189 L.M.
488	1-3	120-11.2
489	1	153-383 to 153-391
489	2	160A-321
489	3	159-13
489	4	153-390 note, 153-391 note
490	. .	58-79.2
491	. .	163-147 L.M.
492	1	163-305
492	2	163-305 note
493	1	168-1 to 168-8
493	2	67-29 Repealed
493	3	168-1 note
494	2, 3	159-43, 159-44
494	4, 5	159-48, 159-49
494	6, 7	159-54, 159-55
494	8, 9	159-60, 159-61
494	10	159-65
494	11	159-72
494	12, 13	159-75, 159-76
494	14-17	159-80 to 159-83
494	18	159-85
494	19	159-88
494	20	159-93
494	21	159-95
494	22, 23	159-121, 159-122
494	24-26	159-129 to 159-131
494	27	159-133
494	28	159-135
494	29	159-139
494	30	159-120
494	31	159-148
494	32	159-151
494	33	159-161
494	34, 35	159-164, 159-165
494	36	159-160
494	37, 38	159-169, 159-170
494	39	159-172
494	40	159-168
494	41	159-176 to 159-178
494	42	159-177
494	43, 44	159-181, 159-182
494	45	131-126.33 Repealed, 131-126.33A Repealed, 131-126.34 Repealed, 131-126.34A, 131-126.35 to 131-126.37 Repealed, 131-126.38A Repealed, 131-126.40 Repealed, 131-126.40B
494	46	162A-37, 162A-38 to 162A-44 Repealed, 162A-46 to

Ch.	Sec.	1973 General Statutes
494	46	162A-48 Repealed, 162A-50 to 162A-52 Repealed
494	47	Ch. 159 note
495	1	116-44.3 to 116-44.5
495	2	116-42 to 116-42.4 Repealed
495	3	116-42 to 116-42.4 note
495	4	116-42 to 116-42.4 note, 116-44.3 note
495	5	116-42 to 116-42.4 note
496	1, 2	136-30.1
497	1	36-32 note
497	2	36-32.1
497	3	25-8-102
497	4	53-159.1
497	5	33-42.1
497	6	34-10
497	7	53-47
499	1	160-377 to 160-398 note
499	2, 3	159-64 note, 160-377 to 160-398 note
500	1	136-41.1
500	2	105-113.86
500	3	105-213
502	1, 2	139-6, 139-7
503	1	7A-49.2
503	2	7A-171
503	3, 4	7A-180
503	5	7A-181
503	6, 7	7A-249, 7A-250
503	8	7A-273
503	9	7A-292
503	10, 11	7A-300
503	12-14	7A-305
503	15	7A-306
503	16, 17	7A-308, 7A-309
503	18-20	7A-311 to 7A-313
503	21, 22	7A-314
504	. .	113-271
505	. .	105-188
506	. .	106-189.1
507	1	143A-98.1, 143A-98.2
507	2	143A-99
507	3	136-17 Repealed, 136-17.2, 136-44.1 to 136-44.11
507	4	136-103.1
507	5	14-128, 15-208, 20-81.1, 20-81.3, 20-81.5, 20-96, 20-115, 20-116, 20-118, 20-118.2, 20-119, 20-121, 20-122, 20-123, 20-130.2, 20-141, 20-141.1, 20-144, 20-150, 20-158,
507	5	20-158.1, 20-165.1, 20-166, 20-169, 20-172, 20-172 note, 20-175, 20-183.9, 20-190.2, 20-194, 20-196, 20-212, 20-215, 40-2, 47-27, 58-190, 62-261, 74-51, 74-67, 77-10, 87-9, 95-28, 100-2, 104-17, 104-23, 105-86, 105-445, 105-446.1, 106-80, 113-28.6, 113A-165, 113A-165 note, 114-4.2, 133-13, 135-1, 135-6, Ch. 136 note, 136-10 to 136-12, 136-16, 136-17.1 to 136-18.2, 136-19, 136-19.1, 136-19.3, 136-20, 136-21, 136-25 to 136-27, 136-28.1, 136-28.2, 136-28.3, 136-29, 136-30, 136-30.1, 136-32, 136-32.2 to 136-33.1, 136-34, 136-35, 136-41.1, 136-41.3, 136-42.1, 136-42.2, 136-42.3, 136-44, 136-45, 136-47, 136-51 to 136-55.1, 136-58, 136-59, 136-62, 136-64, 136-66.1 to 136-66.4, 136-66.5, 136-67, 136-72, 136-81 to 136-89, 136-89.32 to 136-89.38, 136-89.40, 136-89.42 to 136-89.44, 136-89.49 to 136-89.56, 136-89.58, 136-93, 136-97, 136-98, 136-102.2, 136-102.5, 136-103 to 136-109, 136-111, 136-115 to 136-125, 136-128 to 136-140, 136-143 to 136-155, 142-46, 143-61, 143-134, 143-138, 143-215.26, 143-215.41, 143-220, 143-255, 143-258, 143-259, 143-291, 143-392, 143-439, 146-24, 146-26.1, 146-65, 147-22, 147-33.2, 147-45, 147-58, 148-49, 153-9, 153-198, 153-275.2, 153-318, 156-88, 160A-274, 160A-296 to 160A-299,

Ch.	Sec.	1973 General Statutes
507	5	160A-302.1, 161-10, 162A-54, 162A-74, 162A-74 note
507	6, 7	136-13, 136-13.1
507	8, 9	136-14, 136-14.1
507	10	136-15
507	11	136-19
507	12-15	136-19.4
507	16	136-28.1
507	17, 18	136-29
507	19	136-66.5
507	20	136-97
507	21	20-144
507	22	136-4
507	22½	136-63
507	23	136-1 to 136-3 Repealed, 136-4.1 to 136-4.3 Repealed, 136-5 Repealed, 136-60 Repealed, 136-61 Repealed
507	24	136-17.2 note, 136-44.1 note, 136-103.1 note, 143A-98.1 note, 143A-98.2 note
508	. .	130-17
511	1, 2	18A-36.1
511	3	105-113.86
511	4	105-277
511	5	105-113.86
511	6	105-113.95
511	7	105-113.70
512	1-3	153-297 to 153-299
512	4	153-309
512	5	153-321
512	6	153-297 note, 153-298 note, 153-299 note, 153-309 note, 153-321 note
515	1-3	97-29 to 97-31
515	4	97-38
515	5	97-41
515	6, 7	97-61.5, 97-61.6
515	9	97-29 note, 97-30 note, 97-31 note, 97-38 note, 97-41 note, 97-61.5 note, 97-61.6 note
519	. .	47-108.11
520	1	97-25
520	2	97-27
520	3, 4	97-89, 97-90
521	1, 2	97-2
521	4	97-2 note
522	1-10	28B-1 to 28B-10
522	11	28A-2, 28C-2
522	12	28A-20, 28C-20
524	. .	90-88
525	. .	160A-360
528	1	74B-1 to 74B-16
528	3	Ch. 74B note
529	. .	54-21.4
531	1, 2	20-129
533	28	7A-11 note, 7A-12 note, 7A-13 note, 7A-20 note
534	1	143-215.75 to 143-215.99
534	2	143-215.75 note
535	. .	153-272 to 153-275.2, 153A-292
536	1	163-226, 163-227, 163-227.1, 163-227.2, 163-228 to 163-233, 163-233.1, 163-234
536	2	163-251
536	3	163-137
536	4	163-89
536	5	163-235 Repealed, 163-252 Repealed
536	6	163-226 note, 163-227.1 note, 163-227.2 note, 163-233.1 note
537	1	160B-1 to 160B-15
537	2	105-113.86, 105-113.86 note
537	3	105-116
537	4	105-213
537	5	130-23.1 to 130-23.4
537	6	136-41.1
537	7	136-66.6
537	8	105-113.86 note, 105-116 note, 105-213 note, 130-23.1 note, 136-41.1 note, 136-66.6 note, Ch. 160B note
537	9	130-23.1 note, 136-66.6 note
538	1, 2	153-9 L.M.
540	1	14-401.11
540	2-4	90-87
540	5	90-91
540	6	90-90
540	7	90-113 Repealed, 90-113 note
541	. .	90-88
542	. .	90-112
543	. .	120-19.1 to 120-19.8
545	1-6	113A-72 to 113A-77
546	. .	20-116
547	. .	113-35

Ch.	Sec.	1973 General Statutes
548	. .	104B-10
549	. .	95-28
550	. .	18A-17 L.M.
551	. .	163-288.2
552	1-8	85B-1 to 85B-8
552	9	85-1 to 85-27 Repealed, Ch. 85B note
552	10	Ch. 85B note
554	. .	53-50
555	1, 2	153-9
556	1-4	106-65.23 to 106-65.26
556	5, 6	106-65.27
556	7, 8	106-65.28
556	9-11	106-65.30 to 106-65.32
556	12	106-65.35 Repealed
556	13	106-65.36
557	. .	105-369 L.M.
558	. .	152-7
559	. .	20-299
560	. .	105-296
563	. .	143-135 L.M.
564	1	105-366
564	2, 3	105-380, 105-381
564	4	105-355
570	1-9	143B-188 to 143B-196
570	9½	143B-188 note
571	1, 2	7A-101
571	3	7A-172
572	. .	143-166 note
577	. .	165-22
578	1, 2	118-24.1
578	3	118-24.1 note
580	1, 2	115-315.16, 115-315.17
580	3	115-315.16
580	4-8	115-315.18 to 115-315.22
580	10	115-315.16 note
581	1, 2	116-174
583	1-13	160A-349.1 to 160A-349.13
584	3	122-35.12A
584	5	122-35.12A note
586	1	115-180
586	2	115-180 note
587	1-5	143-475.1
587	6	143-475.1 note
588	. .	143-473
590	1	115A-2
590	2, 3	115A-18
594	2, 3	131-61, 131-61.1
594	4	131-62 to 131-71 note
594	5	131-61.1 note
595	1, 2	138-6, 138-7
596	. .	143B-66
598	. .	147-50
600	. .	147-11
603	1	115-205.11 to 115-205.13
603	3	115-38 Repealed,
603	3	115-162, 115-198.1 Repealed
603	4	115-205.11 note
604	. .	105-361
605	. .	86-19
606	. .	18A-15
607	. .	160A-68
608	. .	160A-494
609	. .	160A-59
610	. .	58-260
611	1-4	106-50.4
611	5	106-50.6
611	6	106-50.10
612	. .	20-179.1
613	. .	122-35.23A
614	1	75-16.1
614	2	75-15.1
614	3	1-502
614	4	75-15.1 note, 75-16.1 note
615	. .	105-321
616	. .	7A-451
617	3	147-58
618	1	113-315.15 to 113-315.18, 113-315.18 note, 113-315.19
618	2	113-315.15 note
620	1-8	143B-246 to 143B-253
620	9	34-10, 34-12 to 34-14, 34-15, 127-12 to 127-15, 127-16, 127-18 Repealed, 127-22, 127-79, 143-229, 143-230 Repealed, 143-231 Repealed, 143-232, 143-233, 143-234, 143A-11, 143A-231 to 143A-238 Repealed, 143B-2, 143B-6, 165-1, 165-3, 165-5 Repealed, 165-6, 165-7 Repealed, 165-8, 165-11, 165-20, 165-22, 165-22.1, 166-3, 166-4, 166-8, 167-1 Repealed, 167-2, 167-3 Repealed
620	10	127-13 note
621	1	143-215.41 note
621	2-4	143-215.42
621	5	143-215.51
621	6, 7	143-215.56
621	8	143-215.54
625	1	127-30.1
625	2	127-30.1 note
628	. .	115-315.10
629	. .	20-63
632	1	130-87

Ch.	Sec.	1973 General Statutes
632	2	130-90
634	2	143-166.1 to 143-166.3
634	3	143-166.7
637	1	115A-18
640	1	135-50 to 135-71
640	2	135-1, 135-28.1
640	3	7A-39.3
640	4	7A-52
640	5	7A-39.12
640	6	7A-56
640	7	7A-39.12 note, 7A-56 note, 135-28.1 note, 135-50 note
641	. .	160A-492
642	. .	57-1
643	. .	1-75.10
644	. .	108-60
645	2	108-66
646	. .	7A-41
647	1	115-157
647	2	115-157 note
647	3, 4	115-142.1 Repealed, 115-142.2 Repealed
648	. .	14-155
649	1	110-9
649	2	110-12
649	3	110-15
649	4	110-19
650	. .	122-35.23
654	1, 2	90-95, 90-96
654	3	90-96.1
654	4	90-95 note, 90-96 note, 90-96.1 note
654	5	90-96.1 note
655	1	160A-535 to 160A-543
655	2	160A-541 note, 160A-542 note
656	. .	143-473
658	1	122-86 note
658	2	122-86
659	. .	143-299
660	1, 2	95-17, 95-18
660	3	95-27 Repealed
660	4	95-29 Repealed
661	. .	122-35.19
662	. .	116-191
663	. .	116-41.4
664	1, 2	20-11
665	1-15	106-601 to 106-615
665	16	106-601 note
666	1-3	143-63.1
666	4	143-63.1 note
667	1	128-26
667	2	135-4
668	. .	105-279
669	1	160A-360
669	2	160A-366
670	1	113A-83 to 113A-94
670	2	113A-83 note
671	1	148-8.1
671	2	148-8.1 note
672	. .	25A-38
673	1	122-1.3 to 122-1.6 note
673	2	122-25 note
673	3, 4	122-1.3 to 122-1.6 note
673	5	122-8.1
673	6	122-11.4
673	7	122-13.1
673	8, 9	122-14, 122-15
673	10	122-24
673	11	122-27
673	12	122-31
673	12.1	122-33
673	13	122-37, 122-38, 122-40, 122-44, 122-45 note
673	14	122-56 note
673	15	122-58 note
673	16-18	122-60 to 122-65 note
673	19	122-65.3, 122-65.4 note
673	20, 21	122-83, 122-84
673	22	122-86 note
673	23	122-87
673	24	122-91
673	25	122-66.1 note
673	26-29	122-67 to 122-68.1 note
674	. .	7A-286
675	. .	115-11
676	1	1-544 to 1-567 Repealed, 1-567.1 to 1-567.20
676	2, 3	1-567.1 note
677	. .	113-109
678	. .	7A-102
679	1	20-340 to 20-350
679	2	20-183.2
679	3	20-340 note
680	1	10-1 to 10-17
681	1, 2	105-375
681	3	105-375 note
682	1, 2	122-120
682	3	122-121
682	4, 5	122-122
683	. .	55-50
684	. .	20-32
685	1	95-17.1
685	2	95-17.1 note
686	. .	58-77
688	. .	58-226
689	. .	20-188
695	1	105-275
695	2	105-277
695	3	105-277.01
695	4	105-278 Repealed, 105-278 note, 105-278.1 to 105-278.9, 105-280 Repealed
695	5	105-317
695	6	131-110
695	7	157-26

Ch.	Sec.	1973 General Statutes
695	8	105-282 Repealed, 105-282.1
695	9	55A-16
695	10	63-51.1 Repealed, 63-52 Repealed, 105-281 Repealed, 105-287
695	11, 12	105-283, 105-284
695	13	105-328
695	14, 15	105-273
695	16	105-115
695	17	105-122
695	18	105-339
695	19, 20	105-340, 105-341
695	21	105-277.01 note, 105-278.1 note, 105-278.2 note, 105-278.3 note, 105-278.4 note, 105-278.5 note, 105-278.6 note, 105-278.7 note, 105-278.8 note, 105-278.9 note, 105-282.1 note
696	. .	14-335.1
697	1, 2	126-8
698	1	143-214, 143-215.3
698	2	143-214.2, 143-215.3
698	3	143-215.2, 143-215.3
698	4-7, 9	143-215.3
698	10-12	143-215.4 to 143-215.6
698	13	143-215.8 Repealed, 143-215.8A
698	14	143-215.13
698	15	143-215.15
698	16	143-215.17
698	17	143-215.3
698	18	143-214 note, 143-214.2 note, 143-215.2 note, 143-215.3 note, 143-215.4 note, 143-215.5 note, 143-215.6 note, 143-215.8A note, 143-215.13 note, 143-215.15 note, 143-215.17 note
699	. .	143-295
701	. .	118-1 note
702	1, 2	114-1, 114-2
702	3	114-4
702	4	114-4.1 Repealed
702	5, 6	114-4.2, 114-4.2A
702	7	114-4.3 Repealed
702	8	114-4.4
702	9	114-4.2A note
704	. .	7A-27
705	. .	20-7
706	. .	105-307
708	1	105-164.13
708	2	113-155.1
708	3	113-155.1 note
709	1	105-277.2 to 105-277.7
709	2	105-277.2 note, 105-277.3 note, 105-277.4 note, 105-277.5 note, 105-277.6 note, 105-277.7 note
710	. .	116-143.1
711	. .	14-45.1
712	1	143-215.3
712	2	143-215.6
713	1-7	106-65.42 to 106-65.48
714	1-3	108-38
715	1	96-29
715	2	96-29 note
716	. .	108-24.1
717	1	108-62
717	2	108-4
717	3	108-52
717	4-6	108-63 to 108-65
718	1-4	136-44.14
718	5	136-44.14 note
720	1	20-137.6 to 20-137.14
720	2	20-137.6 note
721	. .	108-45
722	. .	7A-289
723	1	122-56.1 to 122-56.3
723	2, 3	122-56 Repealed, 122-57
724	1	108-11
725	. .	130-233
726	1	122-58.1 to 122-58.8
726	2	7A-246 note, 122-44 Repealed, 122-45 Repealed, 122-58 Repealed, 122-59 to 122-65 Repealed, 122-65.3 Repealed, 122-65.4 Repealed, 122-66.1 Repealed, 122-67 to 122-68.1 Repealed, 122-82.1 Repealed
726	3	122-65.8
726	4	7A-451
726	5	7A-246
726	6	122-58.1 note
728	. .	90-277
729	2	37-16 to 37-40
729	3	37-1 to 37-15 Repealed
729	4	37-16 note
731	1	147-45
731	2	147-50
732	1	65-24
732	2	65-34
733	. .	115-44
734	. .	47A-18
735	. .	105-285
736	1	20-4.18 to 20-4.20

Ch.	Sec.	1973 General Statutes
737	1, 2	135-4, 135-5
738	. .	74B-3
739	1	106-245.15
739	2	106-245.18
739	3	106-245.22
740	1	96-9
740	2	96-8
741	. .	33-31
742	. .	108-40
743	. .	108-24
744	1	108-39.1 note
744	2	108-39.1
745	1	20-279.1
745	2	20-279.5
745	3	20-279.15
745	4	20-279.21
745	5	20-279.25
745	6, 7	20-280, 20-281
745	8	20-279.1 note, 20-279.5 note, 20-279.15 note, 20-279.21 note, 20-279.25 note, 20-280 note, 20-281 note
746	. .	135-33, 135-34
748	. .	15-223
749	. .	17B-1 to 17B-6
750	. .	7A-11
751	. .	50-13.5
752	. .	105-472
753	. .	115-159.1
754	1, 2	58-251.5
754	3	58-251.5 note
755	. .	165-20
756	. .	130-17.1
757	. .	20-51
758	1	110-7
758	2	18A-39, 105-113.80
759	1-3	97-29 to 97-31
759	4	97-38
759	5, 6	97-61.5, 97-61.6
759	8	97-29 note, 97-30 note, 97-31 note, 97-38 note, 97-61.5 note, 97-61.6 note
760	1, 2	97-53
760	4	97-53 note
761	1, 2	97-31
761	4	97-31 note
762	. .	147-45
763	1-3	97-2
764	1-3	20-57
766	1-7	114-26 to 114-32
766	8	114-36
766	10	114-37
768	. .	115A-5
770	1, 2	115-59
771	1-17	106-284.30 to 106-284.46
771	18	106-284.30 note
771	19	106-93 to 106-110 Repealed, 106-146 to 106-158 Repealed, 106-284.30 note, 106-568.8 note
771	21	106-284.30 note
774	. .	122-60 to 122-65 note
775	. .	143-127.1
776	. .	147-50
778	1	147-35, 147-55, 147-65
778	2	115-13
778	3	114-7
778	4	106-11
778	5	95-2
778	6	58-6
780	1	115-142.3
780	2	115-142.3 note
781	. .	122-71.5
782	1-30	115-142
782	31	115-45
783	1-5	105-333
783	6	105-335
785	. .	66-42
786	1	159-97
786	2	159-97 note
787	. .	105-312
788	1	105-374
788	3	105-374 note
789	. .	105-303
790	1	105-275
790	2	105-287
790	3	105-287 note
792	. .	131-94
793	1	163-2
793	2	163-22
793	3	163-20
793	4	163-23
793	5	163-22.1
793	6	163-25
793	7	163-30
793	8	163-32
793	9-11	163-33
793	12	163-42 note
793	13	163-44 Repealed
793	14	163-45
793	15, 16	163-46
793	17	163-47
793	18	163-55
793	19	163-56 Repealed
793	20	163-59
793	21	163-65
793	22	163-66
793	23	163-67.1 note
793	24	163-68 Repealed
793	25, 26	163-69, 163-70
793	27	163-72
793	28	163-72.1
793	29	163-73 Repealed
793	30, 31	163-74
793	32	163-78
793	33-35	163-84 to 163-86

Ch.	Sec.	1973 General Statutes
793	36-38	163-106 to 163-108
793	39-41	163-109
793	42	163-110 note
793	43, 44	163-111
793	45, 46	163-114, 163-115
793	47-49	163-116 to 163-118 Repealed
793	50	163-122
793	51-53	163-128
793	54	163-129
793	55	163-136
793	56, 57	163-140
793	58	163-146
793	59	163-148
793	60, 61	163-150
793	62, 63	163-151, 163-152
793	64	163-153
793	65	163-155
793	66	163-162
793	67	163-168
793	68	163-170
793	69	163-177
793	70	163-179
793	71	163-245
793	72	163-248
793	73	163-263
793	74	163-267
793	75-79	163-280
793	80-83	163-281
793	84	163-284
793	85	163-286
793	86	163-287
793	87	163-288
793	88	163-288.1
793	89	163-289
793	90	163-293
793	91	163-295
793	92	163-304
793	93	163-1
793	94	163-45, 163-46, 163-146, 163-148, 163-153, 163-169, 163-281
793	95	163-42
793	96	163-22.1 note, 163-72.1 note
794	. .	105-42
795	1-3	7A-102.1
796	1, 2	115-78
797	1	143-287.31 Repealed
797	2	143-283.27
798	1, 2	147-45
799	1, 2	7A-465, 7A-466
800	1	90-117
800	2-6	90-117.1 to 90-117.5
800	7	90-118
800	8-18	90-118.1 to 90-118.11
800	19	90-120 Repealed, 90-121.1
800	20	90-118.9 note, 90-121 Repealed, 90-121.2
800	21, 22	90-121.3, 90-121.4
800	23	90-122
800	24	90-124
800	25	90-127.1
800	26	90-126 Repealed, 90-126.1 Repealed, 90-128 Repealed
800	27	90-117.1 note, 90-117.2 note, 90-117.3 note, 90-117.4 note, 90-117.5 note, 90-118.1 note, 90-118.2 note, 90-118.3 note, 90-118.4 note, 90-118.5 note, 90-118.6 note, 90-118.7 note, 90-118.8 note, 90-118.9 note, 90-118.10 note, 90-118.11 note, 90-121.1 note, 90-121.2 note, 90-121.3 note, 90-121.4 note
801	. .	143-521 to 143-526
802	. .	95-87
803	1	153-65, 153A-149
803	2	160A-209
803	3	63-8.1 Repealed
803	4	69-24.1
803	5	69-21
803	6	104B-4
803	7, 8	104B-6
803	9	104B-9
803	10	106-587
803	11	111-17
803	12	127-113
803	13-15	127-114 to 127-116 Repealed
803	16	128-23
803	17	130-155
803	18	131-28.2
803	19, 20	131-28.4, 131-28.5
803	21, 22	131-28.6 Repealed, 131-28.7 Repealed
803	23	131-28.8
803	24	131-28.23
803	25	131-28.28
803	26	131-126.22
803	27	131-126.23 Repealed
803	28	131-126.26 Repealed
803	29	131-126.41
803	30, 31	131-126.42 Repealed, 131-126.43 Repealed
803	33	139-37
803	34	97-7
803	35	122-35.1
803	36	161-25 Repealed

Ch.	Sec.	1973 General Statutes
803	37, 38	158-7.1, 158-7.2
803	39-43	158-3 to 158-7 Repealed
803	44	148-12 note, 158-12
803	45	166-10
803	46	130-21
803	47	130-22 Repealed
803	48	69-24.1 note, 153-65 note, 153A-149 note, 158-7.1 note, 158-7.2 note
807	. .	7A-68
808	. .	7A-377
809	. .	99A-1
810	1	131-52, 131-53 note
810	2	130-114, 131-52, 131-53 note, 131-60, 131-84, 131-89
810	3	131-82.1
811	. .	106-266.8
813	. .	114-11.6
816	1, 2	135-4, 135-5
816	3, 4	128-26, 128-27
817	. .	108-27
818	1	58-248.26, 58-248.27 to 58-248.39
818	2	58-248.40
818	3, 4	58-248.26 note
819	1	18A-28
820	1-3	143-4
821	1-3	143-213
821	4, 5	143-215, 143-215.1
821	6	143-215.105 to 143-215.114, 143-215.114 note
821	7	143-213 note, 143-215 note, 143-215.1 note, 143-215.105 note
821	8	143-215.105
822	. .	108-79 note, 108-80 note, 110-24 note
822	1	Ch. 153 note, 153A-1 to 153A-5, 153A-10 to 153A-14, 153A-17 to 153A-21, 153A-25 to 153A-29, 153A-34, 153A-39 to 153A-50, 153A-52, 153A-58 to 153A-63, 153A-76, 153A-81 to 153A-84, 153A-87 to 153A-89, 153A-92 to 153A-97, 153A-101 to 153A-104, 153A-111, 153A-114, 153A-121 to 153A-137, 153A-146 to 153A-148, 153A-150 to 153A-154,
822	1	153A-158 to 153A-165, 153A-169, 153A-170, 153A-176, 153A-177, 153A-185 to 153A-204, 153A-211, 153A-212, 153A-216 to 153A-228, 153A-233 to 153A-235, 153A-239 to 153A-243, 153A-247 to 153A-250, 153A-255 to 153A-257, 153A-261 to 153A-271, 153A-274 to 153A-278, 153A-283 to 153A-288, 153A-291, 153A-320 to 153A-324, 153A-330 to 153A-335, 153A-340 to 153A-347, 153A-350 to 153A-375, 153A-391 to 153A-398, 153A-401 to 153A-405, 153A-435 to 153A-445
822	2	153-65 renumbered 153A-149, 153-383 to 153-391 transferred to 153A-300 to 153A-308, 153A-34 note, 153A-292, 153A-300 to 153A-308
822	3	153-177 to 153-198 transferred to 162-31 to 162-49, 162-31 to 162-49
822	4	153-295 to 153-324 transferred to 162A-64 to 162A-80, 162A-64 to 162A-80
822	5	154-1 Repealed, 154-2 Repealed
822	6	67-5 to 67-11 Repealed, 67-13 Repealed, 67-19 to 67-28 Repealed, 67-30, 67-33 to 67-35 Repealed
822	7	160A-238
822	9-12	Ch. 153A note
822	13	67-30 note, Ch. 153A note, 160A-238 note
822	15	160A-238 note
823	1	113-109.6, 113-109.7
823	1.5	113-109.8
824	. .	20-16.2
825	1	143A-118
825	2-4	143-241 to 143-243
826	. .	108-38
827	1	1A-1, Rule 37
827	2	1A-1, Rule 37 note
828	1	1A-1, Rule 30

Ch.	Sec.	1973 General Statutes
828	2	1A-1, Rule 30 note
831	1	106-134
831	2	106-134 note
835	. .	75A-13.1 note, 75A-18 note
838	1	7A-133
838	2	7A-133 note
839	. .	57-14
840	. .	41-2.1
843	. .	105-142
844	. .	90-89
845	. .	115-19 L.M.
846	. .	115-54 L.M.
848	. .	47-30
849	1, 2	48-29
849	3	48-36
853	1	39-7.1
853	2	39-7.1 note
855	1	7A-41
855	2	7A-41 note
856	. .	160A-308
858	. .	20-65 note
859	1	163-65
859	2	163-67.1 Repealed
860	. .	130-160
862	. .	163-106
863	. .	153-213.9
864	. .	115-29 L.M.
865	. .	14-234 L.M.
866	. .	163-306
869	. .	115-183
870	1	163-291
870	2	163-294.2
871	1	90-171.7
871	2	90-223
872	1, 2	159-66
873	1, 2	130-42, 130-42.1
873	3	130-43
873	4	130-45 Repealed
873	5	130-46
873	6	130-47 Repealed
873	7	130-202.1
873	8	130-42.1 note
874	. .	143-166 note
875	. .	118-19
877	. .	14-399
878	. .	22A-1
879	. .	113A-35.1
880	1	44-51.8
880	2	14-111.2
881	. .	47B-2
882	2	130-143 note
883	. .	159-65
884	. .	153A-21 Repealed
885	. .	1-79
886	. .	7A-308
887	. .	44-51.8
889	. .	20-279.15
894	. .	44-51.8
902	. .	148-4
903	1	105-152
903	2	105-157
903	3	105-163.16
903	4	105-259
903	5	105-266
904	. .	105-275
906	1, 2	105-277.4
907	. .	44-51.8
909	. .	20-183.8
910	1	105-130.22
910	2	105-151.1
910	3	105-130.22 note, 105-151.1 note
911	. .	113A-36
912	. .	105-60
914	. .	20-16.2
915	. .	84-2 note
916	. .	115-205.12
918	. .	66-29 Repealed
919	. .	20-50
922	. .	9-22 to 9-26 note
923	1	1A-1, Rule 34
923	2	1A-1, Rule 34 note
924	. .	152-5 L.M.
926	. .	113-109.8
927	1	50-11.2
927	2	50-11.2 note
929	. .	143-215
930	. .	115-29 L.M.
931	. .	143-166
932	. .	115-189
933	. .	28-8
939	. .	118-1 note
941	. .	118-1 note
946	. .	18A-16 L.M.
948	. .	91-4 L.M.
951	. .	130-156.4
952	. .	153A-132.1
953	. .	160A-303.1
956	1, 2	62-133, 62-133.1
956	3	62-133.1 note
957	. .	139-39 L.M., 139-40 L.M.
960	. .	118-1 note
961	1-7	143B-197 to 143B-203
962	1	105-275
963	. .	153A-149
964	. .	20-51
965	. .	66-58
966	1, 2	127-37.2, 127-37.3
967	1	54-44.1
967	2	54-44.2 to 54-44.7, 54-44.9 to 54-44.13
970	1	118A-1 to 118A-7 Repealed
970	2	118B-1 to 118B-7 Repealed
973	. .	106-189.2
974	. .	115-29 L.M.
975	. .	113-159 Repealed
978	. .	160A-163 L.M.
981	1	20-219.2
981	2, 3	20-219.2 L.M.
982	. .	126-5
983	. .	160A-24 note, 160A-44 note,

Ch.	Sec.	1973 General Statutes
983	. .	160A-56 note
987	. .	143-129 L.M.
989	. .	143-129 L.M., 143-131 L.M., 160A-388 L.M.
990	. .	160A-508 L.M.
991	. .	44A-24
992	. .	161-30
994	1	135-5
994	2	128-27
994	3	135-5
994	4	128-27
994	5	135-3
995	2	159-65
998	1	90-271
998	2	90-273 Repealed
998	3	90-271
1000	1, 2	18A-17
1001	1, 2	160A-101
1012	. .	18A-39
1013	1, 2	161-14.01
1014	. .	18A-2
1015	1	47-41 note
1016	. .	47-2.2
1017	. .	20-8
1018	. .	163-226
1019	. .	105-228.5
1027	. .	161-11 to 161-13 Repealed
1028	1	105-275
1030	. .	115-117 L.M.
1031	1	108-61.2
1031	2	108-61.2 note
1032	. .	14-118.4
1034	1	105-275
1035	1	58-134.2
1035	2-4	58-134.3
1036	1, 2	87-10
1037	. .	159-48
1041	1	62-133
1041	2	62-133 note
1042	1	53-166
1042	2	53-168
1042	3, 4	53-173, 53-173.1
1042	5	53-176.1
1042	6	53-179
1042	7	53-180
1042	8	53-190
1042	9	53-173.2
1042	10	53-173.1 note, 53-173.2 note
1049	. .	152-1 L.M.
1050	. .	47-30 L.M., 47-30.1 L.M.
1053	1	105-228.11 to 105-228.20 Repealed
1053	2	105-125
1053	3	105-130.7
1053	4	105-130.11
1053	5	105-147
1053	6	105-198
1053	7	105-102.3
1053	8	105-102.3 note, 105-228.11 to
1053	8	105-228.20 note
1053	9, 10	105-102.3 note, 105-125 note, 105-130.7 note, 105-130.11 note, 105-147 note, 105-198 note, 105-228.11 to 105-228.20 note
1057	1	20-7
1057	2	20-7 note
1059	. .	97-36
1060	1	97-24
1060	2	97-47
1060	3	97-58
1061	. .	97-59
1062	1	29-19
1062	2	31-5.5
1062	3	49-14
1063	. .	135-4
1064	. .	105-164.13
1065	. .	105-232
1066	. .	90-96
1067	. .	55-52
1068	1, 2	143-215.99
1069	1	20-316.1
1069	2	20-316.1 note
1070	1	1-305
1070	2	1-310
1071	. .	20-130.3
1072	. .	66-84
1073	. .	62-310
1074	. .	62-81
1075	1-3	163-227
1075	4	163-230
1075	5	163-233
1076	. .	105-164.13
1077	. .	105-275
1078	. .	90-95
1079	1-4	115-11.6 to 115-11.9
1081	1	20-138
1081	2	20-139.1
1081	3	20-17
1082	. .	20-135.4
1083	. .	58-40.01
1084	. .	122-56.1 to 122-56.6, 122-57 Repealed
1085	. .	110-119
1086	. .	110-117
1087	1, 2	55-31
1087	3-5	55-50
1088	. .	20-347
1089	. .	20-109
1090	1	131-120, 131-121, 131-124, 131-126.5, 131-126.6, 131-126.9, 131-126.12, 131-126.14, 131-126.25, 131-126.31, 131-126.32
1090	2	143B-165 to 143B-168
1091	. .	106-65.49
1092	1	90-118.10

Ch.	Sec.	1973 General Statutes
1092	2	90-123
1093	. .	14-258.1
1094	. .	163-30
1095	1	20-109.1
1095	2	20-72
1095	3	20-75
1095	4	20-109.1 note
1096	. .	113-104
1097	1	113-95.4
1097	2	113-95.4 note
1098	. .	113-105
1102	. .	113-187
1103	1, 2	97-29
1104	. .	160A-514 L.M.
1106	1	90-179 to 90-187.12
1106	2	90-179 note
1108	. .	62-116
1109	. .	67-13 note
1110	. .	78-25
1111	. .	131-168, 131-169
1112	. .	93A-6
1113	. .	115-161 Repealed
1114	. .	135-6
1115	. .	163-279
1116	1	7A-451
1116	2	148-62.1
1116	3	148-62.1 note
1117	. .	143B-179
1118	. .	20-57
1119	1, 2	24-1.1A
1119	3, 4	24-1.1A note
1120	. .	148-45
1121	. .	143-514
1122	. .	106-323
1123	. .	127-40
1124	. .	127-37.1
1125	. .	7A-451
1126	1, 2	1A-1, Rule 30
1126	3	1A-1, Rule 30 note
1127	. .	53-43.3
1128	1	45-12 note
1128	2	45-12 note
1129	. .	146-12 L.M.
1130	. .	58-34.1
1131	. .	160A-495
1132	. .	20-28
1133	1, 2	20-166.1
1134	. .	20-64
1135	. .	163-136
1136	1, 2	161-22
1137	. .	115-36
1138	1, 2	96-8
1138	3-7	96-12
1139	. .	7A-311
1140	1	130-97 Repealed, 130-98 Repealed
1140	2	130-115 to 130-122 Repealed
1140	3	153A-225
1141	1, 2	15-6, 15-7
1141	3-8	15-11 to 15-16
1141	9, 10	15-48, 15-49
1141	11	15-107.1
1141	12	15-113
1141	13	15-115
1141	14, 15	15-166, 15-167
1141	16	15-173
1141	17	15-177 to 15-178 Repealed
1141	18	15-186
1141	19, 20	15-200, 15-200.1
1141	21	15-221
1142	1	105-4
1142	2	105-4 note
1143	1	20-50.1
1143	2	20-140.2
1143	3	20-38 note
1144	1, 2	20-316
1145	. .	160A-64
1146	. .	152-1 L.M.
1147	1	58-224.2
1147	2	58-224.2 note
1148	. .	147-12
1149	1, 2	20-108
1150	. .	24-14
1151	. .	130-13
1152	1, 2	84-16, 84-17
1152	3	84-22
1152	4	84-34
1153	. .	148-49.8
1155	. .	115-77
1157	. .	7A-286
1158	. .	143-129 L.M.
1165	. .	115-29 L.M.
1166	. .	115-18 L.M.
1167	. .	18A-16 L.M.
1168	. .	115-29 L.M.
1170	. .	115-29 L.M.
1171	. .	47-30
1172	. .	159-56.1
1173	2	160A-58 to 160A-58.6
1173	3	160A-31 L.M.
1173	4	160A-58 note
1173	6	160A-58 note
1174	. .	115-29 L.M.
1180	. .	105-276, 105-304, 105-333, 105-335, 105-338
1182	. .	44-51.8
1183	. .	90-60
1185	. .	143-129 L.M.
1191	. .	20-158 note
1193	. .	74-12 Repealed
1194	1	44A-25 to 44A-33
1194	2	143-129
1194	3	44A-34
1194	4, 5	136-28.1
1194	6	44-14 Repealed, 136-28.3 Repealed
1194	7	44A-25 note
1195	1, 2	85B-4
1195	3	85B-6
1195	4, 5	85B-8

Ch.	Sec.	1973 General Statutes
1195	6	85B-9
1195	8	105-4 Repealed, 105-47 Repealed
1196	..	14-415.1
1197	1	113-151.1
1197	2	113-151
1197	3	113-151.1 note
1198	1-5	106-405.15 to 106-405.19
1199	..	1A-1, Rule 17
1200	1	105-69 Repealed
1200	2	105-65.1
1201	1	14-17
1201	2	14-21
1201	3	14-52
1201	4	14-58
1201	5	148-58
1201	6	14-2
1201	7	14-17 note, 14-21 note
1203	..	20-124
1204	..	87-21
1205	..	14-17.1
1206	..	62-268
1207	1	47-51
1207	2	47-108.11
1208	..	45-12 Repealed
1209	..	115-78
1210	1-3	113-102
1210	5	113-102
1210	6	113-102 note
1211	..	147-58
1212	..	160A-248
1213	..	108-45
1214	..	153A-274
1215	..	159-39
1216	..	115-133.2
1217	..	55-34
1218	..	18A-36
1220	1	47-108.77
1220	2	47-108.17 note
1221	..	135-28.1
1223	1	163-20
1223	2	163-41
1223	3, 4	163-72, 163-72.1
1223	5	163-74
1223	6	163-88
1223	7	163-150
1223	8, 9	163-280, 163-281
1224	1	130-230, 130-232, 130-233
1224	2	143-508
1224	3	143B-165
1225	1	143-291
1225	2	143-291 note
1226	..	18A-30
1227	..	105-39
1228	1	87-43.3
1228	2	87-44
1229	..	74B-15
1230	1	134-35 to 134-39
1230	2	153A-221.1
1230	3	110-24
1230	4	134-35 note, 153A-221.1 note
1233	..	135-1
1235	1	135-77, 135-78
1235	3	135-77 note
1236	..	7A-172
1239	1, 2	130-170.01, 130-170.02
1239	3	130-170.01 note, 130-170.02 note
1240	1	130-254 to 130-258
1240	3	130-254 note
1241	1-3	127-30.1
1252	..	105-282.1
1253	1, 2	143B-254, 143B-255
1254	..	143A-181
1255	1	54-86
1255	2, 3	54-110
1261	..	118-1 note
1262	..	7A-289.2 note, 20-128 note, 20-183.3 note, 74-51 note, 90A-40 note, 113-322 note, 113-377.8 note, 130-169.03 note, 143-246 note, 143-247 note, 143-248 note, 143-249 note, 143-250 note, 143-254 note, 143-356 note, 162A-23 note, 162A-24 note, 162A-25 note, 162A-29 note
1262	2-9	143B-260 to 143B-267
1262	10	7A-286, 7A-289.2, 13-1, 14-335, 15-10.2, 15-10.3, 15-183, 15-200.2, 15-201 Repealed, 15-202 Repealed, 15-203 to 15-205, 15-206, 15-207, 108-19, 114-14, 130-114, 130-191.1, 134-1 Repealed, 134-2, 134-3 to 134-8

Ch.	Sec.	1973 General Statutes
1262	10	Repealed,
		134-9,
		134-11,
		134-12,
		134-14 to 134-19,
		134-22,
		134-25 to 134-28.1,
		134-29,
		134-35,
		134-36,
		143-318.4,
		143-321,
		143-472,
		143A-163 to 143A-170
		Repealed,
		143B-2,
		143B-6,
		147-45,
		148-1 Repealed,
		148-2,
		148-4,
		148-5,
		148-11,
		148-18 to 148-20,
		148-24,
		148-25,
		148-28,
		148-33,
		148-33.1,
		148-36,
		148-37,
		148-41,
		148-42,
		148-45,
		148-48,
		148-49.1,
		148-49.2,
		148-49.4 to 148-49.9,
		148-52 Repealed,
		148-52.1,
		148-53,
		148-54,
		148-55 Repealed,
		148-56,
		148-57,
		148-58.1,
		148-59,
		148-60.1,
		148-61.1,
		148-62,
		148-64,
		148-74,
		148-78,
		148-83,
		148-84,
		148-101,
		148-101 note,
		148-102,
		148-102 note,
		148-104,
		148-104 note,
		148-105,
1262	10	148-105 note,
		148-106,
		148-106 note,
		148-108,
		148-108 note,
		148-111,
		148-111 note,
		148-113,
		148-113 note,
		153A-221.1
1262	11-17	143B-275 to 143B-281
1262	18	113-81.5,
		113-81.6,
		113-81.8,
		113-81.9,
		113-81.11,
		113-83 to 113-91,
		113-93 to 113-95,
		113-96,
		113-99 to 113-103,
		113-104, 113-104 note,
		113-105,
		113-106,
		113-108,
		113-129 to 113-132,
		113-136 to 113-139,
		113-261,
		113-263 to 113-265,
		113-272 to 113-277,
		113-292,
		113-293,
		113-301,
		113-304 to 113-307
1262	19-22	143B-282 to 143B-285
1262	23	75A-21,
		76-40 note,
		87-70,
		87-85,
		87-87 to 87-93,
		87-95,
		90A-35 to 90A-40,
		90A-43,
		104B-4,
		104B-11,
		104B-14 to 104B-16,
		105-122,
		105-130.10,
		105-147,
		105-275,
		105-278 note,
		113-229 note,
		113-415,
		113A-35,
		113A-113,
		113A-118,
		130-161.1,
		130-165,
		130-166.32,
		139-47,
		143-211,
		143-212 Repealed,
		143-213,

Ch.	Sec.	1973 General Statutes
1262	23	143-214 Repealed,
		143-214.1,
		143-214.2,
		143-215,
		143-215.1 to
		143-215.6,
		143-215.8A,
		143-215.9,
		143-215.10
		Repealed,
		143-215.13 to
		143-215.21,
		143-215.25,
		143-215.26,
		143-215.28 to
		143-215.37,
		143-215.40 to
		143-215.42,
		143-215.48,
		143-215.50,
		143-215.56,
		143-215.62,
		143-215.64 to
		143-215.66,
		143-215.68,
		143-215.69,
		143-215.77 to
		143-215.79,
		143-215.81,
		143-215.83 to
		143-215.88,
		143-215.90 to
		143-215.92,
		143-215.106 to
		143-215.114,
		143-347.2,
		143-350,
		143-354,
		143-355,
		143-357 note,
		143-358,
		143-359,
		146-6.1,
		156-59,
		156-74,
		156-76,
		156-83,
		159-95,
		162A-28,
		162A-30,
		162A-66 to 162A-68
1262	24-27	143B-286 to 143B-289
1262	28	75A-17,
		100-11 to 100-15,
		113-1,
		113-2 Repealed,
		113-4 to 113-7
		Repealed,
		113-8,
		113-9 to 113-13
		Repealed,
		113-14,
		113-14.1,
		113-15.2,
		113-16,
		113-19,
		113-20,
		113-22,
		113-23,
		113-26.1,
		113-28.6,
		113-28.8,
		113-29,
		113-29.1,
		113-31,
		113-34 to 113-36,
		113-44.1 Repealed,
		113-44.2 Repealed,
		113-48,
		113-51,
		113-52,
		113-53 Repealed,
		113-56,
		113-60.4,
		113-60.5,
		113-60.15,
		113-81.1,
		113-128,
		113-129,
		113-132,
		113-134 to 113-138,
		113-151,
		113-151.1,
		113-152,
		113-153,
		113-155,
		113-156 to 113-158,
		113-160,
		113-161,
		113-163,
		113-164,
		113-166,
		113-181,
		113-182,
		113-185,
		113-187,
		113-188,
		113-201 to 113-206,
		113-221,
		113-223,
		113-224,
		113-226,
		113-227 Repealed,
		113-228 to 113-230,
		113-241 to 113-245 Repealed,
		113-251,
		113-254,
		113-264,
		113-265,
		113-310,
		113-312,
		113-313,
		113-315.5,
		113-315.9,

Ch.	Sec.	1973 General Statutes
1262	28	113-315.18, 113-316, 113-317, 113-318 to 113-320 Repealed, 113-321, 113-377.8, 113A-36, 113A-37, 143-286.1, 143-355, 159A-4, 159A-21
1262	29-32	143B-290 to 143B-293
1262	33	74-38, 74-40, 74-41 Repealed, 74-42 to 74-45, 74-49, 74-50, 74-58, 74-61 to 74-63, 74-67, 113A-118
1262	34-37	143B-294 to 143B-297
1262	38	113-132, 139-3, 139-4, 139-5, 139-7, 139-8, 139-13, 139-14, 139-18, 139-26, 139-35, 139-36, 139-38, 139-41, 139-46, 143-215.25, 147-45
1262	39	143B-298, 143B-299
1262	40	143B-298, 143B-299, 143B-299 note
1262	41	113A-53 Repealed, 143B-299 note
1262	42, 43	143B-300, 143B-301
1262	44	90A-36 Repealed
1262	45-50	143B-302 to 143B-307
1262	51	75A-21, 122A-4, 143-319 Repealed, 143-320, 143-321 Repealed, 143-322 Repealed, 143-323, 143-324 Repealed, 143-325, 143-326, 143-327 Repealed,
1262	51	160A-9.2
1262	52-71	143B-308 to 143B-327
1262	72	113-241 to 113-245 Repealed
1262	73-75	143B-328 to 143B-330
1262	76	143-284 to 143-286 Repealed, 143-286.1, 143-287 Repealed, 143-288 Repealed, 143-289, 143-290 Repealed, 143-290.1 Repealed
1262	77, 78	143B-331, 143B-332
1262	79	143-378 to 143-383 Repealed
1262	80, 81	143B-333, 143B-334
1262	82	113A-88
1262	83, 84	143B-335, 143B-336
1262	85	143-171 to 143-176.1 Repealed, 143-177.1, 143-177.3
1262	86	14-129.1, 14-131, 14-137, 14-139, 20-81.3, 47-30, 53A-2, 66-58, 68-43, 69-25.5, 71-16, 74-40, 74-49, 74-53, 75A-5.1, 75A-17, 75A-21, 76-40, 100-2, 102-8, 102-10, 102-14 Repealed, 113-1, 113-8, 113-15, 113-15.2, 113-17, 113-18, 113-21, 113-22, 113-24, 113-26.1, 113-28, 113-28.1 to 113-28.4, 113-28.6, 113-28.9 to 113-28.12, 113-28.13 to 113-28.16 Repealed, 113-29,

Ch.	Sec.	1973 General Statutes
1262	86	113-29.1,
		113-30 to 113-32,
		113-34,
		113-35,
		113-40,
		113-47,
		113-48,
		113-54 to 113-56,
		113-58 to 113-60,
		113-60.1,
		113-60.2,
		113-60.4 to 113-60.10,
		113-60.14,
		113-61 to 113-66,
		113-68,
		113-70 to 113-77,
		113-81.1 to 113-81.3,
		113-90,
		113-112,
		113-114,
		113-115,
		113-117,
		113-119,
		113-123,
		113-136,
		113-161,
		113-185,
		113-187,
		113-202,
		113-221,
		113-229,
		113-230,
		113-254,
		113-315.2,
		113-315.5,
		113-315.9,
		113-316,
		113-317,
		113-321,
		113-378,
		113-379,
		113-383 to 113-386 Repealed,
		113-387 to 113-389,
		113-391 to 113-412,
		113A-33,
		113A-35 to 113A-38,
		113A-41, 113A-42,
		113A-113,
		121-20,
		122A-4,
		130-169.02,
		130-169.03,
		130-169.05,
		136-21,
		136-102.3,
		139-46,
		143-169,
		143-215.3,
		143-252,
		143-253,
		143-255 to 143-257
1262	86	Repealed,
		143-259 Repealed,
		143-260 Repealed,
		143-347.2,
		143-355,
		143-370,
		143A-109 to 143A-129 Repealed,
		143B-2,
		143B-6,
		146-8,
		148-26,
		159A-3,
		159A-4,
		159A-12,
		159A-21
1262	87	143B-260 note
1263	1	160A-282
1263	2	160A-282 L.M.
1264	1	105-275
1264	3	105-275 note
1267	1	7A-210
1267	2	7A-219
1267	3	7A-305
1267	4	42-28, 42-30
1272	1	163-278.6 to 163-278.32, 163-278.34, 163-278.35
1272	2	163-26 note, 163-278.6 note
1272	3	163-278.33
1272	4	163-26
1272	5	163-278.6 note
1274	. .	62-119
1275	. .	163-227.3
1276	. .	36-47
1277	. .	36-5.2
1278	1, 2	135-33, 135-34
1278	3	135-36
1279	1	14-432 to 14-437
1279	2	14-432 note
1280	1	111-41, 111-41 note, 111-42 to 111-47
1280	2	111-41 note
1281	. .	35-36, 35-36 note, 35-37 to 35-50, 35-51 to 35-57 Repealed
1282	. .	105-147
1284	1	113A-100, 113A-100 note, 113A-101 to 113A-128
1284	2	146-22.1
1284	3	113A-100 note, 146-22.1 note
1286	1	15A-101, 15A-131 to 15A-135, 15A-141 to 15A-144, 15A-221 to 15A-223, 15A-231, 15A-241 to 15A-249, 15A-251 to 15A-259, 15A-271 to 15A-282, 15A-285, 15A-301 to

Ch.	Sec.	1973 General Statutes
1286	1	15A-305, 15A-401 to 15A-405, 15A-501, 15A-502, 15A-511, 15A-521, 15A-531 to 15A-544, 15A-546, 15A-547, 15A-601 to 15A-606, 15A-611 to 15A-614, 15A-621 to 15A-624, 15A-626 to 15A-630, 15A-641 to 15A-646, 15A-701 to 15A-706, 15A-711, 15A-771 to 15A-773, 15A-801 to 15A-805, 15A-821 to 15A-823, 15A-901 to 15A-910, 15A-921 to 15A-928, 15A-931, 15A-941 to 15A-945, 15A-951 to 15A-959, 15A-971 to 15A-979, 15A-1001 to 15A-1008, 15A-1011, 15A-1012, 15A-1021 to 15A-1027, 15A-1051 to 15A-1055
1286	2	5-1
1286	3	5-4
1286	4	5-8
1286	5	7A-109.1
1286	6	7A-180
1286	7	7A-273
1286	8	7A-452, 7A-453
1286	9	8-65 to 8-70 transferred to 15A-811 to 15A-816, 15A-811 to 15A-816
1286	10	14-43.1
1286	11	7A-291, 8-57, 8-58 Repealed, 14-277.1, 15-28 to 15-38 Repealed
1286	12	15-176.3 to 15-176.5
1286	13	15-179 note
1286	14	15-182 note
1286	15	15-183 note
1286	16	15-55 to 15-84 transferred to 15A-721 to 15A-750, 15A-721 to 15A-750
1286	17	113-136
1286	18	113-139
1286	19	114-19
1286	20	122-83
1286	21	122-84
1286	22	148-89 to 148-95 transferred to 15A-761 to 15A-767, 15A-761 to 15A-767
1286	23	153A-229
1286	24	160A-286
1286	25	15-176.9
1286	26	8-58 Repealed,
1286	26	9-22 to 9-26 Repealed, 14-224 Repealed, 15-2 Repealed, 15-3 Repealed, 15-9 Repealed, 15-18 note, 15-19 Repealed, 15-20 note, 15-21 note, 15-22 note, 15-23 Repealed, 15-24 Repealed, 15-25 note, 15-26 note, 15-27 note, 15-27.1 note, 15-28 to 15-42 Repealed, 15-44 to 15-46 Repealed, 15-47 note, 15-50 to 15-52 Repealed, 15-85 note, 15-86 to 15-101 Repealed, 15-102 note, 15-103 note, 15-104 Repealed, 15-105 to 15-107 Repealed, 15-108 Repealed, 15-109 Repealed, 15-125 Repealed, 15-126 Repealed, 15-126 note, 15-127 to 15-129 Repealed, 15-129 note, 15-134 to 15-139 Repealed, 15-140 note, 15-140.1 to 15-143 Repealed, 15-147 Repealed, 15-152 Repealed, 15-154 Repealed, 15-155.4 note, 15-155.5 note, 15-156 to 15-159 Repealed, 15-159 note, 15-160 to 15-162 Repealed, 15-175 Repealed, 15-177 to 15-178 note, 18A-23 note, 122-87 Repealed, 122-87.1 Repealed, 122-91 Repealed
1286	27, 28	8-58 note, 15-2 note, 15-3 note, 15-9 note, 15-18 to 15-24 note, 15-25 note, 15-26 to 15-27.1 note, 15-28 to 15-38 note, 15-39 to 15-42 note, 15-44 to 15-47 note, 15-50 to 15-52 note, 15-85 to 15-101 note, 15-102 note,

Ch.	Sec.	1973 General Statutes
1286	27, 28	15-103 note, 15-104 note, 15-105 to 15-107 note, 15-108 note, 15-109 note, 15-125 to 15-127 note, 15-128 note, 15-129 note, 15-134 to 15-136 note, 15-137 to 15-139 note, 15-140 to 15-143 note, 15-147 note, 15-152 note, 15-154 note, 15-155.4 note, 15-155.5 note, 15-156 to 15-161 note, 15-162 note, 15-175 note, Ch. 15A note, 18A-23 note, 122-87 note, 122-87.1 note, 122-91 note
1286	29	5-1 note, 5-4 note, 5-8 note, 7A-180 note, 7A-273 note, 7A-291 note, 7A-452 note, 7A-453 note, 8-57 note, 8-58 note, 15-2 note, 15-3 note, 15-9 note, 15-18 to 15-24 note, 15-25 note, 15-26 to 15-27.1 note, 15-28 to 15-38 note, 15-39 to 15-42 note, 15-44 to 15-47 note, 15-50 to 15-52 note, 15-85 to 15-101 note, 15-102 note, 15-103 note, 15-104 note, 15-105 to 15-107 note, 15-108 note, 15-109 note, 15-125 to 15-127 note, 15-128 note, 15-129 note, 15-134 to 15-136 note, 15-137 to 15-139 note, 15-140 to 15-143 note, 15-147 note, 15-152 note, 15-154 note, 15-155.4 note, 15-155.5 note, 15-156 to

Ch.	Sec.	1973 General Statutes
1286	29	15-161 note, 15-162 note, 15-175 note, 15-179 note, 15-182 note, 15-183 note, Ch. 15A note, 18A-23 note, 113-136 note, 113-139 note, 114-19 note, 122-83 note, 122-84 note, 122-87 note, 122-87.1 note, 122-91 note, 160A-286 note
1286	31	5-1 note, 5-4 note, 5-8 note, 7A-109.1 note, 7A-180 note, 7A-273 note, 7A-291 note, 7A-452 note, 7A-453 note, 8-57 note, 8-58 note, 14-43.1 note, 14-277.1 note, 15-2 note, 15-3 note, 15-9 note, 15-18 to 15-24 note, 15-25 note, 15-26 to 15-27.1 note, 15-28 to 15-38 note, 15-39 to 15-42 note, 15-44 to 15-47 note, 15-50 to 15-52 note, 15-85 to 15-101 note, 15-102 note, 15-103 note, 15-104 note, 15-105 to 15-107 note, 15-108 note, 15-109 note, 15-125 to 15-127 note, 15-128 note, 15-129 note, 15-134 to 15-136 note, 15-137 to 15-139 note, 15-140 to 15-143 note, 15-147 note, 15-152 note, 15-154 note, 15-155.4 note, 15-155.5 note, 15-156 to 15-161 note, 15-162 note, 15-175 note,

Ch.	Sec.	1973 General Statutes
1286	31	15-176.3 note, 15-176.9 note, 15-179 note, 15-182 note, 15-183 note, Ch. 15A note, 18A-23 note, 113-136 note, 113-139 note, 114-19 note, 122-83 note, 122-84 note, 122-87 note, 122-87.1 note, 122-91 note, 153A-229 note, 160A-286 note
1287	1	66-20
1287	2	105-2, 105-4, 105-11, 105-22, 105-24
1287	3	105-114, 105-116, 105-119, 105-120, 105-122, 105-125
1287	4	105-130.3 to 105-130.5, 105-130.9, 105-130.17
1287	5	105-141, 105-141.1, 105-141.3, 105-142, 105-142.1, 105-144 to 105-144.2, 105-147, 105-149, 105-150 Repealed, 105-152, 105-154, 105-157
1287	6	105-161, 105-163
1287	7	105-163.6, 105-163.11, 105-163.15
1287	8	105-164.3, 105-164.4, 105-164.13
1287	9	105-188, 105-197
1287	10	105-197.1
1287	11	105-200, 105-202, 105-203, 105-206, 105-211 to 105-213
1287	12	105-228.11 to 105-228.20 note
1287	13	105-236, 105-241.1, 105-242, 105-253, 105-259
1287	14	105-446, 105-446.1, 105-446.3
1287	15	105-150 note, 105-197.1 note, 105-253 note
1288	1	18A-15
1288	2	105-113.93, 105-113.94
1291	1	97-3
1291	2	97-4 Repealed
1291	3	97-5
1291	4	97-7
1291	5	97-9
1291	6	97-10.1
1291	7-9	97-14 to 97-16 Repealed
1291	10	97-19
1291	11	97-27 note
1291	12, 13	97-93, 97-94
1291	14	97-2
1292	1, 2	95-64, 95-64.1
1292	3-5	95-68
1292	6	95-68.1
1293	2-4	115-1.1
1293	5	120-65
1293	6, 7	115-1.2, 115-1.2 note
1293	9	110-71
1293	10	115-179.1
1293	14	115-179.1 note
1294	. .	66-58
1295	. .	18A-34
1296	1, 2	122A-1, 122A-2
1296	3-6	122A-3
1296	8-14	122A-3
1296	16, 17	122A-3
1296	18-20	122A-4
1296	21-24	122A-5
1296	27	122A-5
1296	29	122A-5
1296	35, 36	122A-5
1296	40-43	122A-5
1296	44, 45	122A-5.1, 122A-5.2
1296	46, 47	122A-6, 122A-7 Repealed
1296	48-52	122A-8 to 122A-12
1296	55-60	122A-15 to 122A-20
1296	64	122A-4 note
1296	65	122A-1 note, 122A-2 note, 122A-3 note, 122A-4 note, 122A-5 note, 122A-5.1 note, 122A-5.2 note, 122A-6 note, 122A-7 note, 122A-8 note, 122A-9 note, 122A-10 note, 122A-11 note, 122A-12 note, 122A-15 note, 122A-16 note, 122A-17 note, 122A-18 note, 122A-19 note, 122A-20 note
1297	. .	113-136
1298	1	44A-2
1298	1.1	44A-2 note
1299	. .	128-15.3
1300	. .	93B-7
1301	. .	93B-4
1302	. .	93B-6
1303	1	93B-5
1303	2	93B-5 note
1304	1	106-50.7
1304	2	106-50.7 note
1305	. .	106-454
1306	1	113A-150 to 113A-156
1306	3	113A-150 note
1306	4-6	113A-157 to 113A-159
1306	7	113A-150 note
1307	. .	148-101 note, 148-102 note, 148-104 note, 148-105 note,

Ch.	Sec.	1973 General Statutes
1307	. .	148-106 note, 148-108 note, 148-111 note, 148-113 note
1307	1	148-101 to 148-113
1307	2	148-101 note
1308	1, 2	97-29
1308	3, 4	97-38
1308	5	97-41 Repealed
1308	6, 7	97-61.6
1308	8	97-29 note, 97-38 note, 97-41 note, 97-61.6 note
1309	1	47-41 note
1309	2	47-41
1310	1-4	128-26
1311	1-5	135-4
1312	1-3	135-5
1313	1, 2	128-27
1315	. .	113-134.1
1316	1	25-9-403
1316	2, 3	25-9-404
1316	4, 5	25-9-405
1316	6, 7	25-9-406, 25-9-407
1317	. .	161-10
1318	1-8	108-116 to 108-123
1318	10	108-116 note
1320	. .	7A-451
1321	. .	89-8
1322	. .	20-183.8
1323	. .	20-194
1324	1	119-27.1
1324	2	119-27.1 note
1325	. .	159-96
1326	. .	159-47
1327	. .	67-12 L.M.
1329	. .	Ch. 28 note, Ch. 28A note, 28A-3-2 note
1329	1	28-1 to 28-201 Repealed, 28C-10 note
1329	2	28A-1 to 28A-22 transferred to 28C-1 to 28C-22, Ch. 28C note, 28C-1 to 28C-22
1329	3	28A-1-1 to 28A-26-9
1329	4	28-53 transferred to 36-67, 36-67, 36-67 note
1330	1	20-4.01
1330	2	20-17
1330	3	20-140
1330	4-6	20-140.2 to 20-140.4
1330	7	20-141
1330	8, 9	20-141.3, 20-141.4
1330	10, 11	20-142, 20-143
1330	12	20-143.1
1330	13, 14	20-146, 20-146.1
1330	15, 16	20-149, 20-150
1330	17-21	20-152 to 20-156
1330	22	20-158, 20-158 note
1330	23	20-158.1
1330	24, 25	20-160, 20-161
1330	26	20-163
1330	27, 28	20-165, 20-165.1
1330	29	20-166.1
1330	30	20-168
1330	31	20-172, 20-172 note
1330	32, 33	20-173, 20-174
1330	34	20-176
1330	35	20-217
1330	36	20-162.2 transferred to 20-219.2, 20-162.3 transferred to 20-219.3, 20-219.2, 20-219.2 note, 20-219.3, 20-219.3 note
1330	37	20-279.14
1330	38	14-72.2
1330	39	20-6 Repealed, 20-38 Repealed, 20-105 Repealed, 20-116, 20-124, 20-140.1 Repealed, 20-141.1 Repealed, 20-159 Repealed, 20-164 Repealed, 20-175, 20-175.4 Repealed, 20-176 note, 20-180 Repealed, 20-215.1, 20-279.1, 20-286
1330	40	14-72.2 note, 20-4.01 note, 20-140.3 note, 20-140.4 note, 20-141.4 note
1331	. .	150-1 to 150-34 Repealed
1331	1	150A-1 to 150A-3, 150A-9 to 150A-17, 150A-23 to 150A-37, 150A-43 to 150A-52, 150A-58 to 150A-64
1331	2	143-195 to 143-198.1 Repealed, 143-215.114 note, 143-306 to 143-318 Repealed
1331	3	54-109.11 note, 90-22, 90-22 note, 90-103, 90-103 note, 90-113.2, 90-113.2 note, 90-121.3, 90-121.3 note, 90-171.5, 90-171.5 note, 90-171.15, 90-171.15 note, 90-197, 90-197 note, 90-231, 90-231 note, 90-265, 90-265 note, 90-270.15, 90-270.15 note, 90-279, 90-279 note, 90A-26, 90A-26 note, 90A-41, 90A-41 note, 93C-7, 93C-7 note, 93D-3, 93D-3 note, 93D-13, 93D-13 note, 95-123, 95-123 note, 95-141, 95-141 note, 104B-14, 104C-4, 104C-4 note, 106-65.32, 106-65.32 note, 106-266.8,

Ch.	Sec.	1973 General Statutes
1331	3	106-266.8 note, 106-266.15, 106-266.15 note, 106-284.44, 106-284.44 note, 106-406, 106-406 note, 106-407.2, 106-407.2 note, 106-418.11, 106-418.11 note, 106-549.21, 106-549.21 note, 106-549.55, 106-549.55 note, 106-549.64, 106-549.64 note, 106-568.8, 106-568.8 note, 106-611, 106-611 note, 113-229, 113-229 note, 113A-54, 113A-54 note, 115-165, 115-165 note, Ch. 150A note
1331	4	143-195 to 143-198.1 note, 143-306 to 143-316 note, 143-317 note, 143-318 note, 150-1 to 150-34 note, Ch. 150A note
1332	1	8-44.1
1332	2	8-44.1 note
1334	1	93B-8
1334	3	93B-8 note
1335	1	7A-307
1335	2	7A-307 note
1336	1	58-135.1
1336	2	58-135.1 note
1338	. .	105-147
1339	1	7A-289.1 to 7A-289.7
1339	2	7A-134 Repealed, 108-19, 110-21 Repealed
1339	3	7A-289.1 note
1340	. .	105-361
1341	. .	96-29
1342	1	93B-5
1342	2	86-6 note, 93B-5 note
1343	. .	87-43.4
1344	1	163-106 note
1344	2, 3	163-150
1344	4	163-30
1344	5	163-32
1344	6	163-30 note, 163-32 note
1345	1, 2	93D-3
1345	3	93D-7
1345	4	93D-9
1346	. .	136-89.59
1347	. .	14-288.4
1348	1	1-217.2
1348	2	1-217.2 note
1349	. .	105-116
1351	1	115-11.1
1351	2	115-11.1 note
1352	. .	148-65.1A
1353	. .	15-205.1
1354	1-4	48-4
1354	5	48-7
1354	6	48-21
1355	. .	122-35.20
1356	. .	93B-9
1357	1, 2	97-38
1358	1	90-87
1358	2, 3	90-88
1358	4, 5	90-89
1358	6-9	90-90 to 90-93
1358	10	90-95
1358	11	90-108
1358	12	90-101
1358	13	90-107
1358	14	90-102
1358	15	90-87 to 90-94, 90-106
1359	1-3	163-42
1360	1	88-13
1360	2	88-15
1360	3, 4	88-17
1361	. .	90-109
1362	. .	20-17.1
1363	. .	135-3
1364	. .	116-143.1
1365	. .	118-6
1366	1, 2	44-51.4, 44-51.5
1367	1, 2	143B-143
1368	. .	84-26
1369	. .	18A-15
1370	1-6	106-284.15 to 106-284.20
1370	7	106-284.22
1370	8	106-284.14 note
1371	. .	152-1 L.M.
1372	. .	143-300.6
1373	1	93B-10
1373	2	93B-10 note
1374	. .	14-58.1, 14-58.2
1375	. .	153A-301
1376	. .	7A-133
1377	. .	116-143.1
1378	1	108-91 to 108-101
1378	2	7A-451
1378	3	7A-246
1378	4	108-91 note
1379	1	147-36
1379	2	147-54.2
1380	. .	78-1 Repealed, 78-2 Repealed, 78-3 note, 78-4 note, 78-5 to 78-18 Repealed, 78-19 note, 78-20 to 78-22 Repealed, 78-23 note, 78-24 Repealed, 78-25 note,

Ch.	Sec.	1973 General Statutes
1380	. .	Ch. 78A note, 78A-1, 78A-2, 78A-8 to 78A-10, 78A-16 to 78A-18, 78A-24 to 78A-29, 78A-36 to 78A-39, 78A-45 to 78A-50, 78A-56, 78A-57, 78A-63 to 78A-65
1381	. .	136-18.3
1382	. .	113-104 L.M.
1383	1	105-113.56B
1383	2	105-113.56B note
1384	. .	20-37.6
1385	. .	135-63
1386	1, 2	20-77
1387	1	52-8
1387	2	52-8 note
1388	. .	14-163
1389	1, 2	20-66, 20-66.1 Repealed
1390	. .	93A-4
1391	. .	58-180.2
1392	1, 2	75-29
1392	3	75-29 note
1393	. .	62-118
1394	1-4	25B-1 to 25B-4
1395	1	20-81.1
1395	2	20-81.6
1396	. .	18A-15
1397	. .	138-5
1398	. .	86-15
1399	. .	14-269.1 note
1401	. .	160A-308
1402	. .	47-48
1403	1	20-50.1
1403	2	20-38 note
1405	1-7	113A-135 to 113A-141
1405	8	113A-135
1405	9, 10	113A-142, 113A-143
1406	. .	153A-391 L.M., 158-8 L.M., 160A-460 L.M.
1407	. .	108-25
1408	. .	122-58.1 note
1408	1	122-58.1 to 122-58.18
1408	2	122-8.1
1408	3	122-36
1408	4	122-43
1409	1	143A-22 Repealed
1409	2	163-28
1409	3	163-27
1409	4	163-28 note
1410	1, 2	59-78
1410	3	59-80
1410	4	59-82
1411	. .	30-17
1413	. .	14-33
1414	1	83-12
1414	2	133-1.1
1415	. .	147-58
1416	1, 2	143B-10
1416	3	143B-14
1417	1	113A-52
1417	2	143B-299 note
1417	3-5	113A-55 to 113A-57
1417	6	113A-54
1418	1, 2	108-54, 108-54.1
1418	3	108-55 note
1418	4, 5	108-56, 108-57
1418	6	108-54 note, 108-54.1 note, 108-55 note, 108-56 note, 108-57 note
1419	. .	143-128
1420	. .	123-5
1421	. .	105-278.3
1422	. .	120-58 to 120-64
1423	. .	143-135.3
1424	. .	20-187.2
1425	. .	135-5.1
1428	. .	74B-11
1430	. .	138-1
1431	. .	105-449.2
1432	. .	20-80
1433	. .	122-85
1434	1	14-190.1
1434	2-8	14-190.2
1434	9, 10	14-190.10, 14-190.11
1434	11	14-190.10 note, 14-190.11 note
1435	. .	1-42.3
1436	1	122-55.1
1436	2-5	122-55.2
1436	6, 7	122-55.6
1436	8	122-55.13, 122-55.14
1437	1	122-84.1
1437	2	122-86 Repealed
1437	3	122-84.1 note, 122-86 note
1438	1	58-155.65 to 58-155.83
1438	2	58-155.65 note
1439	1-5	136-143
1439	6-8	136-145 to 136-147
1439	9, 10	136-149, 136-149.1
1439	11	136-151
1439	12	136-155
1440	1	58-173.27
1441	1	108-107 to 108-110
1441	2	108-107 note
1443	1-3	113-28.6 to 113-28.8
1444		62-134
1445	1-4	20-19
1446	1	115-25
1446	2	58-155.49
1446	3	25A-33
1446	4	7A-112
1446	5	90-92
1446	6	90-112
1446	7	29-12
1446	8	133-14
1446	9	55B-14
1446	10	52-6
1446	11	47-7
1446	12	165-18
1446	13	162A-45
1446	14	143-215.41

Ch.	Sec.	1973 General Statutes
1446	15	31-40
1446	16	149-1
1446	17	8-5
1446	18	33-69.1
1446	19	1-339.71
1446	20	105-198
1446	21	20-77
1446	22	7A-134 note
1446	23	20-84.2
1446	25	153A-149
1446	26	158-12
1446	27	148-12
1446	28	20-16.2 note
1447	1-6	136-71.6 to 136-71.12
1448	. .	146-25.1
1449	1, 2	20-118
1450	. .	160A-167
1451	. .	120-44.1
1452	1-3	18A-35
1452	4	18A-34
1456	. .	138-6
1457	1-6	106-26.7 to 106-26.12
1457	7	66-58
1459	. .	143-283.44
1460	. .	127-102
1463	. .	147-58 note
1465	1	122-35.15
1465	2	122-35.25
1474	. .	7A-44
1476	1	58-228
1476	2	65-36
1480	. .	20-183.7
1481	1, 2	88-1
1482	1, 2	120-3, 120-3.1
1482	3	120-4.1 Repealed, 120-4.1 note, 120-4.2
1482	4	120-4.2 note p. 1413, Resolution 112, 130-93, 143B-216.6, 143B-216.7

SESSION LAWS OF 1975

Ch.	Sec.	General Statutes
1	. .	20-158
2	1-5	96-12
2	6	96-13
7	. .	88-1
8	1, 2	96-13
9	. .	130-200
11	. .	136-33
12	. .	163-66
16	. .	85A-1 to 85A-34 note
17	. .	20-141 L.M.
19	1	1-567.2
19	2	7A-56
19	3	7A-286
19	4	14-288.4
19	5	18A-39
19	6	20-137.7
19	7	28A-3-2
19	8	28A-9-2
19	9	28A-13-3
19	10, 11	28A-26-8
19	12	Ch. 28 note, Ch. 28A note, Ch. 28C note, 36-67 note
19	13	37-21
19	14	41-2.1
19	15, 16	47-41
19	17	55-50
19	18	58-248.34
19	19	74B-15
19	20	78A-18
19	21	78A-27
19	22	78A-56
19	23	89-1 to 89-16 note
19	24	90-118
19	25	90-226
19	26	95-17
19	27	105-42
19	28	105-130.11
19	29	105-259
19	30	106-65.28, 106-65.28 note
19	31	106-143
19	32	106-284.41
19	33	106-418.3
19	34	106-418.11
19	35	111-4
19	36	113-315.18
19	37, 38	113-394
19	39	115-321
19	40	121-12
19	41	122-7.1
19	42	122A-3
19	43	122A-4
19	44	131-83
19	45	136-63
19	46	136-89.32
19	47	136-115
19	48	143-127.1
19	49	143-166.2
19	50	143-214.1
19	51	143-215.1
19	52	143-215.2
19	53	143-215.114
19	54	143-283.7
19	55	143A-97 to 143A-108 note
19	56	143B-85
19	57	143B-142
19	58	143B-251
19	59	147-45
19	60	153A-63
19	61	153A-445
19	62	159-178

Ch.	Sec.	1975 General Statutes
19	63	159A-3
19	64	160A-101
19	65	163-22
19	66	163-30
19	67	163-42
19	68	163-110
19	69	163-227
19	70	163-280
19	71	165-22.1
19	72	166-10
21	. .	153A-159 L.M.
22	1-3	148-33.1
23	1	76-1 note, 76-18 note
23	2	76-1
23	3	76-18 Repealed
24	. .	106-495.1 Repealed,
		106-495.2 Repealed
26	1	159-64 note
28	. .	93A-6
29	. .	87-43.3
31	. .	118-1 note
32	1, 2	90-220.1
32	3	90-220.4
39	. .	106-112 to
		106-119 Repealed
40	. .	36-4
44	. .	20-187.2
45	. .	62-81
46	. .	20-24
47	. .	20-196.3
48	1	108-29 to
		108-37.1 note
48	2	108-29 to
		108-37.1 note
49	. .	105-307
50	. .	163-278.33
51	. .	118-1 note
53	1	105-113.86
53	2	105-113.93
53	3	105-113.94 Repealed
54	1	29-19
54	2	49-16
55	. .	54-33.3
56	. .	19A-1 note
56	1-5	19A-10 to 19A-14
56	7	19A-10 note
57	1	45-21.4
57	2	45-21.4 note
60	. .	66-84
61	1, 2	20-185
62	. .	105-277.4
63	. .	152-1 L.M.
65	1	115-37
65	2	115-198
66	. .	45-10
67	. .	160A-245
68	1, 2	86-5
69	1, 2	150A-59
69	3	150A-63
69	4	20-9 note,
		20-139.1 note,

Ch.	Sec.	1975 General Statutes
69	4	20-300 note,
		20-305.1 note,
		20-305.3 note,
		20-321 note,
		53-188 note,
		54-79 note,
		54-81 note,
		54-109 note,
		74-44 note,
		74-62 note,
		74-63 note,
		74B-7 note,
		74B-14 note,
		83-9 note,
		85B-8 note,
		86-21 note,
		86-25 note,
		87-10 note,
		87-11 note,
		87-23 note,
		87-35 note,
		87-47 note,
		87-59 note,
		87-80 note,
		88-27 note,
		89-8 note,
		89-9 note,
		89A-7 note,
		89A-8 note,
		90-22 note,
		90-41.1 note,
		90-103 note,
		90-113.2 note,
		90-121.3 note,
		90-136 note,
		90-171.5 note,
		90-171.15 note,
		90-182 note,
		90-185 note,
		90-187.8 note,
		90-197 note,
		90-231 note,
		90-249 note,
		90-265 note,
		90-270.15 note,
		90-279 note,
		90A-11 note,
		90A-26 note,
		90A-41 note,
		93-12 note,
		93A-6 note,
		93C-7 note,
		93D-3 note,
		93D-13 note,
		95-123 note,
		95-135 note,
		95-141 note,
		106-266.8 note,
		106-266.15 note,
		106-284.44 note,
		106-406 note,

Ch.	Sec.	1975 General Statutes
69	4	106-407.2 note, 106-418.11 note, 106-549.21 note, 106-549.55 note, 106-549.64 note, 106-611 note, 113-229 note, 113A-54 note, 113A-123 note, 115-165 note, 115-251 note, 116-15 note, 143-195 to 143-198.1 note, 143-215.114 note, 143-306 to 143-318 note 150-1 to 150-8 note, 150-10 to 150-34 note, Ch. 150A note, 150A-63 note
69	5, 6	150A-59
69	7	150A-63
72	. .	115-143
74	1	105-163.9
74	2	105-163.16
74	3	105-266
76	1	1-75.7
76	2	1A-1, Rule 12
76	3	1-75.7 note, 1A-1, Rule 12, note
77	. .	143-247.2
78	1, 1.5, 2	106-266.7
78	3, 4	106-266.7 note
79	. .	20-11
82	. .	130-69
83	. .	130-9
84	. .	130-87
89	. .	148-49.9
90	. .	143B-140
91	. .	48-36
92	2, 3	108-64, 108-65
92	4	108-23
93	. .	136-33
94	. .	20-4.01
96	. .	152-1 L.M.
99	. .	1A-1, Rule 33
100	. .	160A-364 L.M.
102	1	160A-263
102	2, 3	160A-263 note
103	. .	115-131 L.M.
104	. .	105-164.3
105	. .	153A-335 L.M.
106	1, 2	30-1, 30-1 note
107	. .	93-12
108	. .	93A-2
109	. .	20-183.6
110	1	53-173
110	2, 3	53-173.2 Repealed, 53-173.2 note
111	. .	1-79
112	. .	93A-4
113	. .	116A-8
114	. .	18A-17 L.M.
117	. .	15A-1021
118	. .	Ch. 28 note, Ch. 28A note, Ch. 28C note, 36-67 note
119	. .	122-93
121	. .	36-32
123	1, 2	108-60
123	3, 4	108-60 note
125	. .	106-568.35
126	. .	106-50.10
127	. .	106-50.5
128	1, 2	143B-181
129	1, 2	6-21.3, 6-21.3 note
130	1, 2	105-120.2, 105-120.2 note
131	. .	15-199
132	. .	15A-743
134	. .	7A-109 note, 14-402 note, 14-409.1 note
135	1, 2	32-34, 32-34 note
137	1, 2	165-21, 165-21 note
138	. .	15-208 Repealed
139	. .	7A-109 note, 14-402 note, 14-409.1 note
141	. .	117-18
142	1-3	105-39
143	1	105-228.5
144	1	78A-25
144	2	78A-36
144	3	78A-56
144	4	78A-63
145	1, 2	120-32.2, 120-32.3
145	3	120-32.1
145	4	120-32.2 note, 120-32.3 note
146	. .	160A-241 L.M.
148	1-5	20-116
149	1	163-137
149	2	163-162
149	3	163-160
150	1	115-52.1
150	2	115-187
150	3	115-52.1 note
151	1, 2	115-179.1
154	1, 2	116A-9, 116A-10
156	. .	160A-496
158	. .	126-16
159	1, 2	163-30, 163-31
159	3, 4	163-41
159	5, 6	163-30 note, 163-31 note
160	1	165-20
160	2	165-22
160	3	165-22.1
161	. .	31-47
162	1, 2	20-7, 20-7 note
163	1, 2	14-71, 14-72
164	1	97-31

Ch.	Sec.	1975 General Statutes
164	3	97-31 note
166	2	15A-101
166	3	15A-302
166	4, 5	15A-303
166	6	15A-305
166	7, 8	15A-501
166	9-11	15A-511
166	12	15A-531
166	13	15A-534
166	14	15A-612
166	15	15A-801, 15A-802
166	16	15A-907
166	17	15A-910
166	18	15A-921
166	19	15A-926
166	20	15A-1002 to 15A-1004
166	21	15A-1027
166	22	7A-109.1
166	23	7A-180
166	24	7A-181
166	25	15-126, 15-126 note, 15-129, 15-129 note, 15-159, 15-159 note
166	26	15-49 Repealed, 15-103.2 Repealed, 15-104.1 Repealed, 15-107.1 Repealed, 162-31 Repealed
166	27	Ch. 15A note, 15A-302, 15A-926, 15A-1002, 15A-1011
166	28	Ch. 15A note
167	1, 2	165-22, 165-22 note
170	. .	148-45
171	. .	113-95.4
172	. .	66-50 to 66-57 Repealed
173	. .	7A-109 note, 14-402 note, 14-409.1 note
174	. .	128-1.1
178	. .	159-77
179	. .	163-96
180	2	128-21 L.M.
181	1	43-63
181	2, 3	43-64
182	1	66-11.1
182	2	66-11
182	4	66-11.1 note
183	1	102-13 Repealed
183	2	102-13 note
184	2, 3	62-133, 62-133 note
186	1	159B-1 to 159B-35
186	2	Ch. 159B note
186	3	159B-36
191	1	14-132.2
191	2	14-132.2 note
192	. .	47-30
197	1-4	113-95
197	5	113-95.2
197	6	113-95.3
197	7, 8	113-95.5, 113-95.6
197	9-11	113-96
197	12	113-96.1
197	13	113-114, 113-115, 113-117, 113-119
197	14	113-114
197	15	113-271
197	16	113-272
197	17	113-272.1
197	18	113-95 note, 113-95.2 note, 113-95.3 note, 113-95.5 note, 113-95.6 note, 113-96 note, 113-96.1 note, 113-114 note, 113-115 note, 113-117 note, 113-119 note, 113-271 note, 113-272 note, 113-272.1 note
198	. .	76-14
200	1	47-30
200	2	47-30 note
201	. .	152-1 L.M.
202	. .	161-5 L.M., 162-5 L.M.
203	. .	160A-241 L.M.
204	. .	143-340
205	1	128-26
205	2	135-4
206	1-20	74-24.1 to 74-24.20
206	21	74-1 to 74-24 Repealed, 74-24.1 note
207	. .	1-38
208	. .	20-4.01
209	1, 2	143-300.6
210	. .	20-194
211	1, 2	163-35
216	. .	113-109
217	. .	113-100 L.M., 113-104 L.M.
220	. .	143B-266
221	. .	20-81.4
222	. .	20-79.2
223	1	20-7.1
223	2	20-7.1 note
224	1	162A-3.1
224	2	162A-4
224	3, 4	162A-5

Ch.	Sec.	1975 General Statutes
224	5, 6	162A-14
225	. .	20-141
226	1, 2	96-13
226	3	96-8
227	. .	17B-4
228	. .	110-64.6 to 110-64.9
229	1	15-205
229	2	15-199
229	3	15-199 note, 15-205 note
230	. .	148-46
231	. .	153A-331
233	1	116-176
233	2	116-191
234	1	163-80
234	2	163-72, 163-74
236	1	105-147
237	1, 2	110-117
238	. .	7A-278
239	4	20-1 note
240	. .	18A-15
241	. .	148-45 note
242	1	105-113.82
242	2	105-113.82 note
243	1	62-1 note
243	2	62-3
243	3	62-10
243	4	62-60.1
243	5	62-76
243	6	62-81
243	7	62-82
243	8	62-134
243	9	62-13, 62-71, 62-76, 62-77, 62-78, 62-81
243	10	62-13, 62-76, 62-78
243	11	62-1 note
244	. .	130-22.1 Repealed
246	. .	163-1 note
247	. .	118-1 note
251	1	162A-27
251	2	162A-28
251	3, 4	162A-29
252	1	1-17
252	2	1-52
252	3	1-17
252	4	1-52
252	5	1-54
253	. .	113-45 to 113-50 Repealed
254	. .	62-3
255	. .	97-44
256	1	95-87
257	1	126-22 to 126-28
257	2	126-22 note
258	. .	153A-446
259	. .	30-17
260	1	24-1.1A
260	2-4	24-1.1A note
261	1	80-46 to 80-56 Repealed, 80-57 to 80-66
261	2	80-57 note, 80-61 note, 95-87 note
262	. .	48-9.2
263	. .	153A-335 L.M.
264	. .	115-126
265	1	153A-159
265	3	153A-159 note
266	1	97-2
266	2	97-2 note
268	. .	116-15
270	. .	152-1 L.M.
271	. .	130-10
272	. .	130-13
275	1	105-7
275	2	105-113.10, 105-148
275	3	105-113.86
275	4	105-130.3, 105-141
275	5	105-203, 105-206
275	6	105-164.3
275	7	105-259
275	8	105-269.2
275	9	105-289
278	. .	148-26
279	1	87-1
279	2, 3	87-10
279	4	87-12
280	1	113-120.1
280	2, 3	113-120.2
281	. .	130-9
283	. .	139-27
284	1	167-2
284	2, 3	97-2
284	4	97-29
284	6	143-166.1
284	7	143-166.2
284	8	143-166.3
284	9	143-166.7
286	. .	163-19
288	. .	97-2
289	. .	153A-129 L.M.
290	1	160A-44
290	2	160A-56
290	3	160A-44 note, 160A-56 note
292	1, 2	143-135
294	. .	1-105

Ch.	Sec.	1975 General Statutes
295	. .	20-7
296	1, 2	20-7
300	1	28A-2-3
300	2	28A-6-4
300	3	28A-8-1
300	4	28A-13-10
300	5	28A-15-1
300	6	28A-16-1
300	7	28A-17-4
300	8	28A-20-1
300	9	28A-25-1
300	10	28A-25-5
300	11	28A-26-2
300	13	31-12
301	. .	20-279.14
302	. .	20-309
303	. .	55-45
304	. .	55-50
305	. .	45-37
306	1	15A-503
306	2	153A-225.1
306	3	15A-503 note, 153A-225.1 note
307	. .	20-166.1
309	1	15-200.1
309	2	15-200.2 Repealed
310	. .	110-118
311	1	130-166.16 note
311	2-4	130-166.16 to 130-166.18
312	. .	160A-30
314	. .	117-13
315	. .	14-258.3
316	1	14-258.2
316	2	14-258.2 note
318	. .	44-69, 44-69.1
319	. .	36-1
320	1	47-95
320	2	47-95 note
321	1	48-5
321	2	48-2
322	. .	122-58.7
323	. .	143-128 L.M., 143-129 L.M., 143-131 L.M., 143-132 L.M.
324	5	159-67, 159-67 note
325	. .	20-118
326	1, 2	20-279.21
326	3	20-48
327	1	105-113.50A
327	2	105-113.50A note
328	. .	7A-14, 7A-14 note, 147-52 transferred to 7A-14
329	. .	18A-2
330	1	18A-37
330	2	18A-42
331	. .	14-401.5
333	. .	152-1 L.M.
334	. .	163-278.23
335	1, 2	48-37, 48-38
335	3	48-37 note, 48-38 note
336	. .	105-380 L.M.
340	1	75A-2
340	2	75A-6
340	3	75A-8
344	. .	28-68 to 28-68.3 transferred to 28A-25-6, 28A-25-6 note
345	1	58-251.6
345	2	57-7.1
346	. .	14-286
348	1-3	20-309
348	4	20-311
349	. .	143-128 L.M., 143-129 L.M.
351	. .	14-401.5
353	. .	118-1 note
360	1	15-197.1
360	2	90-95
360	3	15-197.1 note, 90-95 note
361	1, 2	1-539.15
361	3	1-539.15 note
362	1	143-169.1
362	2	143-169.1 note
366	1	136-44.30 to 136-44.34
366	2	136-44.30 note
370	1	163-302
370	2	163-291, 163-294.2
371	1	31B-1 to 31B-7
371	2	29-10
371	3	31-42
371	4	28A-13-3
371	5	58-205.2
371	6	Ch. 31B note, 58-205.2 note
372	1	143A-55.1
372	2	17A-6
373	1	136-72
373	2	20-118
374	. .	7A-109 note, 14-402 note, 14-403 note, 14-409.1 note
377	. .	14-404 L.M.
379	. .	160A-514 L.M.
382	. .	115-190
383	. .	115-157
384	. .	115-51
385	. .	113A-165, 113A-165 note, 113A-166 to 113A-170

Ch.	Sec.	1975 General Statutes
386	. .	143B-89
387	. .	121-20
389	. .	153A-21 note
390	. .	150A-1
391	1	1-285
391	2	1-287 Repealed
391	3	1-279
391	4	1-280 Repealed
391	5	15-180
391	6	15-180.3
391	7	1-282 Repealed
391	8	1-283
391	9	1-284 Repealed
391	10	1-287.1 Repealed
391	11	58-9.5
391	12	62-90
391	13	62-91
391	14	62-94
391	15	97-86
391	16	1-279 note, 1-280 note, 1-282 note, 1-283 note, 1-284 note, 1-285 note, 1-287 note, 1-287.1 note, 15-180 note, 15-180.3 note, 58-9.5 note, 62-90 note, 62-91 note, 62-94 note, 97-86 note
393	1, 2	1-69.1
394	1, 2	164-14
395	. .	163-69
396	1	130-14
396	2	130-14.1
399	1, 2	143-341
400	1-4	122-35.20
401	. .	90-92
402	. .	14-24 Repealed, 14-25 Repealed, 14-48 Repealed, 14-180 Repealed, 14-185 Repealed, 14-187 Repealed, 14-198 Repealed, 14-262 Repealed, 14-319 Repealed, 72-39 Repealed, 99-4 Repealed
403	. .	130-14.1
404	. .	113A-35.1
405	. .	20-139.1
407	. .	160A-507.1
408	. .	1A-1, Rule 4
409	. .	14-234
410	. .	54-21.2
411	1	105-113.68
411	2	18A-2
411	3	18A-18
411	4	18A-37
411	5	18A-29
411	6	18A-36.1
411	7	18A-41
411	8	18A-42
411	9	105-113.72
411	10	105-113.70
412	1	95-70 to 95-72 Repealed, 168-14 note
412	2	168-14
412	3, 4	168-14 note
413	1-12	95-161 to 95-172
413	13, 14	95-161 note
415	. .	62-3
418	. .	118-1 note
420	. .	160A-77 L.M.
422	. .	130-65 L.M.
423	. .	118-1 note
425	1, 2	143-442
425	3	143-443
425	4	143-449
425	5	143-453
425	6	143-451, 143-456
425	7	143-451
425	8	143-456
425	9	143-453
425	10	143-455
425	11	143-460
426	1	134-1 to 134-139 note
426	2	153A-221.1
427	1	58-173.34 to 58-173.51
427	2	58-173.34 note
428	. .	161-10
430	. .	20-85
431	. .	20-88.1
432	. .	20-81, 20-81 note
434	1-5	143-64.10 to 143-64.14
434	6	143-64.10 note
435	1	160A-456
435	2	153A-376
436	. .	116-143.1
437	. .	159-26 note
437	1	115-78 to 115-80 Repealed, 115-81 to 115-90 Repealed, 115-91 to 115-98 Repealed, 115-100 Repealed, 115-100.1 to 115-100.35
437	2-4	115-116
437	5	115-117
437	6	115-124
437	7	115-48 Repealed, 115-60 to 115-62 Repealed, 115-65

Ch.	Sec.	1975 General Statutes
437	7	Repealed, 115-133.2, 115-155
437	8	115-64
437	9	115-66
437	10	115-9
437	11	115-205.19
437	12	159-7
437	13, 14	159-13 note
437	15	159-27
437	15.1	115-17
437	16	115-78 to 115-80 note
437	17	115-100.3 note, 115-100.9 note
437	18	115-9 note, 115-17 note, 115-48 note, 115-60 to 115-62 note, 115-64 note, 115-65 note, 115-66 note, 115-78 to 115-80 note, 115-81 to 115-90 note, 115-91 to 115-98 note, 115-100 note, 115-100.1 note, 115-116 note, 115-117 note, 115-124 note, 115-133.2 note, 115-155 note, 115-205.19 note, 159-7 note, 159-13 note, 159-27 note
437	19	115-100.1 note, 115-205.19 note
438	1	44A-4
438	2	20-77
438	3	20-137.10
439	1	40-10.6
439	2	40-10.6 note
440	. .	66-84
441	. .	7A-142
442	. .	90-91
443	1	90-89
443	2	90-90
444	. .	7A-313
445	. .	20-24
447	1	62-300
447	2	62-266
448	. .	162A-77.1
449	1, 2	8-50.1
449	3	49-7
450	1	148-62
450	2	148-65.3
451	. .	136-44.20
452	1	113A-109
452	2	113A-116
452	3	113A-117
452	4	113A-125
452	5	113A-100 note, 146-22.1 note
453	. .	18A-15
454	1	45-21.42 note
454	2	45-21.44
454	3	45-21.42 note, 45-21.44 note
455	. .	160A-274
456	1-7	113-229
457	1	135-1
457	2-4	135-5
457	5	135-8
459	. .	122-58.7
461	. .	44A-2
462	. .	20-50
463	1	95-28.1
463	2	95-28.1 note
465	. .	163-99
466	. .	97-103
468	. .	130-69
470	. .	160A-514 L.M.
471	. .	15A-943
476	1	46-25
476	2	46-25 note
477	. .	14-404 L.M.
478	. .	14-404 L.M.
479	. .	160A-37 L.M.
481	. .	159-30
482	. .	147-69.1
483	1, 2	75A-5
483	3	75A-6
485	1-3	128-26
486	1, 2	128-27
487	1	153A-185
487	2	153A-205
488	1	136-102.6
488	2	136-102.6 note
489	1, 2	105-149
490	. .	120-71 to 120-79
492	. .	45-21.45
492	1	45-21.16A, 45-21.16A note
492	2	45-21.16, 45-21.16 note
492	3	45-21.17
492	4-6	45-21.21
492	7-9	45-21.29
492	10	45-21.30
492	11	45-21.33
492	12	45-21.45
492	13	45-21.9 note, 45-21.16 note, 45-21.16A note, 45-21.17 note, 45-21.21 note, 45-21.29 note, 45-21.30 note, 45-21.33 note
492	14	45-21.16 note, 45-21.17 note,

Ch.	Sec.	1975 General Statutes
492	14	45-21.21 note, 45-21.29 note, 45-21.33 note
492	15	45-21.9
492	16	45-21.9 note, 45-21.16 note, 45-21.16A note, 45-21.17 note, 45-21.21 note, 45-21.29 note, 45-21.30 note, 45-21.33 note, 45-21.45 note
493	. .	14-139, 14-139 L.M.
494	. .	156-81
495	1	52-8
495	2	52-8 note
496	1, 2	7A-112
498	. .	160A-241 L.M.
504	. .	118-1 note
506	1, 2	148-26
506	3	148-18
507	. .	47-18
508	1	105-289
508	2	105-299
509	. .	77-13, 77-14
510	. .	62-134
511	1, 2	135-5
511	3	135-5 note
512	. .	143B-282
513	. .	136-41.1
514	2	159-7
514	3	159-8
514	4	159-11
514	5, 6	159-13
514	7, 8	159-13.1, 159-13.2
514	9	159-14
514	10, 11	159-25, 159-26
514	12, 13	159-28, 159-28.1
514	14	159-29
514	15	159-34
514	16	159-26
	17	153A-29 Repealed, 160A-65 Repealed
514	18	159-7 note
515	. .	133-10.1
516	. .	153A-267
517	1, 2	160A-475
518	1	131-84 to 131-89 Repealed
518	2, 3	130-114
519	1	58-189
519	2	58-191.1
520	1, 2	35-43, 35-44
521	1	143-215.99 Repealed
521	2	143-215.100 to 143-215.102
521	3	143-215.100 note
522	1	136-104
522	2	136-104 note
523	. .	146-25.1
526	1	114-4.2B
526	2	114-4.2B note
527	. .	142-13
528	. .	54-44.8
529	. .	7A-41
531	1-15	89B-1 to 89B-15
531	16	Ch. 89B note
533	. .	20-141 L.M.
534	1	105-3
534	2	105-3 note
535	. .	105-3
536	. .	130-124
536	1-5	115-1.1
538	1	54-74 to 54-109 Repealed, 54-109.1 to 54-109.6, 54-109.10 to 54-109.17, 54-109.21, 54-109.22, 54-109.26 to 54-109.31, 54-109.35 to 54-109.49, 54-109.53 to 54-109.61, 54-109.65 to 54-109.71, 54-109.75 to 54-109.78, 54-109.82, 54-109.86 to 54-109.88, 54-109.92 to 54-109.95, 54-109.99
538	2, 3	54-110
538	4	54-109.1 note, 54-109.10 note, 54-109.21 note, 54-109.26 note, 54-109.35 note, 54-109.53 note, 54-109.65 note, 54-109.75 note, 54-109.82 note, 54-109.86 note, 54-109.92 note, 54-109.99 note
541	1	95-68
541	2	95-68.1 note
543	. .	14-87
544	. .	81-1 to 81-82 rewritten as 81A-1 to 81A-88, 81A-1 to 81A-88
545	1, 2	159-64, 159-64 note
546	1, 2	159-64 note
547	. .	20-183.7
548	. .	20-84
549	1	159-48
549	2	160A-311
550	1	93D-3
550	2	93D-5
550	3	93D-11
551	1	105-144.2
551	2	105-144.2 note
552	. .	36-23.2
553	. .	53-62
554	. .	15-180.2
555	. .	7A-31
556	. .	130-60

Ch.	Sec.	1975 General Statutes
558	1, 2	7A-304
558	3	7A-305
559	1	105-147
559	2	105-161
559	3, 4	105-141
559	5	105-142
559	6	105-141
559	7	105-212
559	8	105-228.5
560	. .	85A-1 to 85A-34 note
563	6	115-1.2, 115-1.2 note
563	7	115-1.2, 115-1.2 note
563	8, 9	115-179.1
564	1	120-85 to 120-105
564	2	120-106
564	3	120-85 note
565	1	163-278.9
565	2, 3	163-278.16, 163-278.17
565	4	163-278.23
565	5	163-278.34
565	6	163-278.19
565	7	163-278
565	8	163-259 to 163-268 Repealed
565	9	163-278.31
565	10	163-278.33
566	. .	105-275
568	1-4	136-128
568	5, 6	136-129, 136-129.1
568	7	136-130
568	8-10	136-131
568	11, 12	136-133, 136-134
568	13	136-134.1
568	14	136-135
568	15	136-140
568	16	136-129.1 note, 136-134.1 note
569	1-3	115-29
569	4	115-29 note
570	1, 2	106-65.23
570	3, 4	106-65.24
570	5-7	106-65.25 to 106-65.27
570	8-13	106-65.28
570	14-17	106-65.29 to 106-65.32
570	18	106-65.37
570	19	106-65.37 note
571	. .	90-203 to 90-210.17 rewritten as 90-210.18 to 90-210.25, 90-210.18 to 90-210.25
572	. .	90-106
573	. .	5-1 note, 5-4 note, 5-8 note, 7A-109.1 note, 7A-180 note, 7A-273 note, 7A-291 note, 7A-452 note, 7A-453 note,
573	. .	8-57 note, 8-58 note, 8-65 to 8-70 note, 9-22 note, 9-23 to 9-26 note, 14-43.1 note, 14-224 note, 14-277.1 note, Ch. 15 note, 15-2 note, 15-3 note, 15-9 note, 15-18 to 15-24 note, 15-25 note, 15-26 to 15-27.1 note, 15-28 to 15-38 note, 15-39 to 15-42 note, 15-44 to 15-47 note, 15-50 to 15-52 note, 15-55 to 15-76 note, 15-78 to 15-84 note, 15-85 to 15-101 note, 15-102 note, 15-103 note, 15-104 note, 15-105 to 15-107 note, 15-108 note, 15-109 note, 15-125 note, 15-126 note, 15-127 note, 15-128 note, 15-129 note, 15-134 to 15-136 note, 15-137 to 15-139 note, 15-140 to 15-143 note, 15-147 note, 15-152 note, 15-154 note, 15-155.4 note, 15-155.5 note, 15-156 to 15-158 note, 15-159 note, 15-160 note, 15-161 note, 15-162 note, 15-175 note, 15-176.9 note, 15-179 note, 15-182 note, 15-183 note, Ch. 15A note, 15A-721 note, 15A-743 note, 15A-761 note, 15A-811 note, 18A-23 note, 113-136 note, 113-139 note, 114-19 note,

Ch.	Sec.	1975 General Statutes
573	. .	122-83 note,
		122-84 note,
		122-87 note,
		122-87.1 note,
		122-91 note,
		148-89 to 148-95 note,
		153A-229 note,
		160A-286 note
575	. .	20-219.2
576	1	160A-24
576	2	160A-31
576	3	160A-37
576	4	160A-49
576	5	160A-58.3
577	. .	152-1 L.M.
578	. .	105-277
579	. .	113-109.8
580	. .	143-49
581	1-4	148-60.3
581	5	148-60.3 note
582	1, 2	84-4.1
582	3	84-23
582	4	84-28.2
582	5, 6	84-28, 84-28.1
582	7-10	84-29 to 84-32
582	11	84-36.1
582	12	7A-29
582	13	84-4.1 note,
		84-23 note,
		84-28 note,
		84-28.1 note,
		84-28.2 note,
		84-29 note,
		84-30 note,
		84-31 note,
		84-32 note,
		84-36.1 note
583	1	143-215
583	2-4	143-215.1
583	5, 6	143-215.3
583	7	143-215.6
583	8	143-214.1
584	. .	20-81.4
585	1, 2	143B-66
586	1	18A-38
586	2	18A-29
586	3	105-113.97
587	1	1A-1, Rule 14
587	2	1B-1
587	3	1A-1, Rule 14, note,
		1B-1 note
588	. .	20-125
589	1	143-300.1
589	2	143-300.1 note
590	. .	143-347.10 to 143-347.14
591	1	105-125
591	2	105-130.11
592	1	74B-10
592	2-4	74B-11
592	5	74B-13
592	6, 7	74B-15, 74B-16
592	8, 9	74B-4
593	. .	20-146
595	1	44-51.8
595	2	44-51.4
599	1	58-251.7
599	2	57-7.2
599	3	57-7.2 note,
		58-251.7 note
600	1	58-195.5
601	. .	90-112.1
602	1, 2	129-31 to 129-39 note
603	1	58-201.1
603	2, 3	58-201.2
604	. .	Ch. 127A note
604	1	127-1 to 127-127 Repealed,
		143-229 Repealed,
		143-232 to 143-236.1
		Repealed
604	2	127A-1 to 127A-10,
		127A-16 to 127A-23,
		127A-29 to 127A-61,
		127A-67 to 127A-74,
		127A-80, 127A-81,
		127A-87 to 127A-91,
		127A-97 to 127A-99,
		127A-105 to 127A-110,
		127A-116 to 127A-119,
		127A-125 to 127A-131,
		127A-137 to 127A-139,
		127A-145 to 127A-155,
		127A-161 to 127A-169,
		127A-175 to 127A-184
605	. .	95-86
606	1-6	115B-1 to 115B-6
607	. .	58-237.2 Repealed
608	. .	115-157
609	. .	1A-1, Rule 4
610	1	119-49
611	1, 2	106-24, 106-25
611	3	106-26.2
611	4	106-26.2 note
612	. .	130-233
613	. .	113-112, 113-123
614	1, 2	106-121
614	3-5	106-122
614	6	106-124
614	7-9	106-125
614	10	106-126
614	11, 12	106-128
614	13-16	106-129
614	17-20	106-130
614	21	106-132
614	22-24	106-133
614	25-28	106-134
614	29	106-134.1
614	30-32	106-134 to 106-136
614	33-35	106-137
614	36, 37	106-139, 106-139.1
614	38, 39	106-140, 106-141

Ch.	Sec.	1975 General Statutes
614	40	106-144
614	41	106-121 note, 106-122 note, 106-124 note, 106-125 note, 106-126 note, 106-128 note, 106-129 note, 106-130 note, 106-132 note, 106-133 note, 106-134 note, 106-134.1 note, 106-135 note, 106-136 note, 106-137 note, 106-139 note, 106-139.1 note, 106-140 note, 106-141 note, 106-144 note
614	42	106-121 note, 106-174 to 106-184.1 Repealed, 106-174 to 106-184.1 note, 106-210 to 106-219 Repealed, 106-210 to 106-219 note, 106-219.1 to 106-219.9 Repealed, 106-219.1 to 106-219.9 note, 106-220 to 106-232 Repealed, 106-220 to 106-232 note, 106-233 Repealed, 106-233 note, 106-236 to 106-238 Repealed, 106-236 to 106-238 note, 106-239 Repealed, 106-239 note
614	43	106-134.1 note, 106-139.1 note
615	. .	136-44.9
616	1, 2	122A-5
616	3	122A-5.1
618	1	148-60.2
618	2	148-58.1
618	3	148-60.2 note
619	. .	Ch. 85C note
619	1	85A-1 to 85A-34 rewritten as 85C-1 to 85C-41, 85C-1 to 85C-41
619	2	85C-40, 105-41.1 Repealed
619	3	85C-41
620	1, 2	113-54, 113-55
620	3	113-55.1
620	4	113-92
620	5	113-55 note
621	. .	128-27 note
621	1, 2	128-27
622	1-4	18A-28
624	1, 2	115-165.1
625	. .	136-107
626	1	15A-1011
626	2, 3	7A-180, 7A-181
626	4	7A-273
627	. .	90-18.1
634	1, 2	135-5
634	3	135-5 note
635	. .	168-9
636	1	14-134.2
636	2	14-134.2 note
637	1	105-161
637	2	37-20
637	3	33-42.1
637	4	37-18
637	5	28A-21-2
638	. .	143-216 note
639	1	136-64.1
639	2	160A-299.1
640	. .	18A-15
641	. .	131A-1 note
642	1	8-35.1
642	2	15A-924
642	3	8-35.1 note
643	. .	58-3.1
644	. .	20-176
645	. .	106-91
646	. .	106-568.8
647	1	113A-52
647	2	113A-57
647	3	113A-51
648	1	85B-3
648	2-4	85B-4
648	5	85B-6
648	6, 7	85B-8, 85B-9
650	1, 2	90-96
650	3, 4	90-113.14
650	5	15-223
650	6	15-223 note, 90-96 note, 90-113.14 note
654	1, 2	18A-38
654	3	105-113.84
654	4	18A-3
655	1, 2	143-215.1
655	3	143-215.3
655	4	143-215.65
655	5	143-214.1
656	1	52A-1 to 52A-32
656	2	52A-1 note, 52A-2 note, 52A-3 note, 52A-4 note, 52A-5 note, 52A-6 note, 52A-7 note, 52A-8 note, 52A-8.1 note, 52A-8.2 note, 52A-9 note, 52A-9.1 note,

Ch.	Sec.	1975 General Statutes
656	2	52A-10 note, 52A-10.1 note, 52A-10.2 note, 52A-10.3 note, 52A-11 note, 52A-11.1 note, 52A-12 note, 52A-12.1 note, 52A-12.2 note, 52A-13 note, 52A-14 note, 52A-15 note, 52A-16 note, 52A-17 note, 52A-20 note, 52A-21 note, 52A-22 note, 52A-23 note, 52A-24 note, 52A-25 note, 52A-26 note, 52A-27 note, 52A-28 note, 52A-29 note, 52A-30 note, 52A-31 note, 52A-32 note
656	3	52A-8.2 note, 52A-9.1 note, 52A-10.3 note, 52A-12.2 note, 52A-20 note, 52A-21 note, 52A-22 note, 52A-23 note, 52A-24 note, 52A-25 note, 52A-26 note, 52A-27 note, 52A-28 note, 52A-29 note, 52A-30 note, 52A-31 note
658	1, 2	17B-4
659	1-8	106-621 to 106-628
659	9	106-621 note
660	1	58-341 to 58-358
660	2	53-189, 58-195.5 note
660	3	53-189 note, 58-210 note, 58-260.2 note, 58-341 note
660	4	58-210, 58-260.2 Repealed
660	5	53-189 note, 58-210 note, 58-260.2 note, 58-341 note
661	1	105-147
661	2	105-130.7
661	3	105-204
661	4	105-203
662	. .	132-1.1
663	. .	143B-337 to 143B-339
664	2	106-386 Repealed
664	3	136-66.1
664	4	160A-9.2
664	5	160A-74
664	6	160A-101, 160A-101 note
664	7	160A-209
664	8	160A-216
664	9	160A-274
664	10	160A-284
664	11	160A-319
664	12	160A-356
664	13	160A-357 Repealed
664	14	160A-406
664	15	160A-441
664	16	160A-455
664	17, 18	160A-488, 160A-489
666	1	58-30.3, 58-30.4
666	2	58-248.9 Repealed
667	2	126-2, 126-6, 126-7 to 126-11, 126-23, 126-25, 126-26
667	3, 4	126-2
667	5	126-3
667	6, 7	126-4
667	8, 9	126-5
667	10	126-34 to 126-37
667	11	126-43 to 126-45
667	12	126-10
667	13	126-34 note, 126-43 note
668	. .	58-54.4, 115-153
669	. .	113-104
670	1	58-131.3A
670	2	58-131.3A note
671	. .	143-129 L.M., 143-131 L.M.
672	. .	90-202.22 note
672	1	90-188 to 90-202.1 rewritten as 90-202.2 to 90-202.14, 90-202.2 to 90-202.14
672	2	90-202.8 note
673	1, 2	113-95.5, 113-95.6
673	3	113-96.1
674	1	159-171
674	2	159-168 note
674	3-5	159-172
675	1, 2	90-270.11
675	3	90-270.14
676	1-4	113-44.3 to 113-44.6
678	1	115-165 Repealed
678	2	115-166
678	3	115-175.1 Repealed
678	4	115-200 Repealed
678	5	115-296 to 115-299 Repealed

1975

Ch.	Sec.	General Statutes
678	6	115-300 to 115-305 Repealed
678	7	115-306 to 115-315 Repealed
678	8	115-315.16 to 115-315.22 Repealed
678	9, 10	115-11.2
679	1, 2	148-22
679	3	148-33.1
680	. .	18A-31.1
681	1	89-1 to 89-16 rewritten as 89C-1 to 89C-28, 89C-1 to 89C-28
681	2	Ch. 89C note
682	1	148-26 note, 148-26.1 note, 148-26.2 note, 148-26.3 note, 148-26.4 note, 148-26.5 note
682	2	148-26
682	3	148-26.1 to 148-26.5
682	4	148-18 note, 148-26 note
683	. .	20-183.2
684	. .	20-7
685	1	1-539.21
685	2	1-539.21 note
686	1	115-153
686	2	115-153 note
688	1	150A-63
688	2	150A-63 note
689	1	160A-456
689	2	153A-376
690	1	90-8
690	2	90-10
690	3, 4	90-13, 90-14
690	5	90-14.2
692	1, 2	120-30.10, 120-30.11
692	3	120-30.18
693	. .	153A-138
694	1	90-212 to 90-216 Repealed
694	2	143B-204 to 143B-206
694	3	90-216.6
694	4, 5	90-220.3
694	6	143B-142
696	1, 2	132-4, 132-5
696	3	14-76.1
696	4	14-72
696	5	14-76.1 note
697	. .	14-78
698	. .	113A-35.2
699	1, 2	115-10, 115-11
699	3	115-14
699	4	115-17
699	5	115A-3
700	. .	18A-35.1
701	1	153A-98
701	2	160A-168
701	3	153A-98 note, 160A-168 note
702	1-3	48-9
703	1-3	14-52 note, 14-58 note
704	. .	136-18.4
705	. .	148-45
706	. .	69-25.2
707	1	84-23.1
707	2	84-23.1 note
708	1, 2	106-564, 106-564.1
708	3, 4	106-567
709	1	143A-171 note
709	2	54-24.1, 143A-171 note
709	3	54-24.1, 143A-171 note
709	4-6	143A-171 note, 143A-181
709	7	117-1, 143A-171 note
709	8	117-5, 143A-171 note
711	. .	163-41
712	1	130-152.2
712	2	130-152.2 note
713	. .	163-35
714	. .	48-6
715	1, 2	44A-7, 44A-8
716	1	143B-345 to 143B-360
716	2	143-216, 143-218, 143-219
716	3	113-28.5, 113-28.6, 113-28.8 to 113-28.12
716	4	76-25 to 76-39 Repealed, 76-59
716	5	8-35.1, 8-35.1 note, 14-401.4, 115C-520, 20-1 to 20-4.01, 20-4.2, 20-4.4, 20-4.9, 20-4.19, 20-4.20, 20-7, 20-9, 20-11, 20-13 to 20-16.1, 20-16.1 note, 20-16.2, 20-17.1, 20-17.2, 20-19, 20-20, 20-22 to 20-29, 20-30, 20-34.1, 20-36, 20-37.1, 20-37.7, 20-39, 20-40, 20-42 to 20-50, 20-52 to 20-58.4, 20-58.6, 20-61 to 20-64.2, 20-66, 20-67 to 20-71, 20-72 to 20-79.1, 20-80, 20-81.1, 20-81.3 to 20-82, 20-84 to 20-85, 20-87 to 20-88.1, 20-91, 20-94, 20-97, 20-102 to 20-104, 20-108 to 20-109.1, 20-109.1 note, 20-110, 20-111,

Ch.	Sec.	1975 General Statutes
716	5	20-116, 20-118, 20-123, 20-125.1, 20-135, 20-135.4, 20-141.3, 20-144, 20-154, 20-166, 20-166.1, 20-178, 20-179, 20-183, 20-183.2, 20-183.4, 20-183.7, 20-183.8, 20-183.10 to 20-183.12, 20-183.14, 20-183.16, 20-184, 20-185, 20-188, 20-190, 20-191, 20-192, 20-196, 20-215.2 to 20-215.4, 20-219, 20-221, 20-222, 20-225, 20-226, 20-279.10, 20-279.21, 20-279.34, 20-283, 20-288, 20-290, 20-291, 20-294 to 20-297, 20-309, 20-311 to 20-313.1, 20-316 to 20-317, 20-319.1, 20-328, 114-10.1, 136-32.2, 143A-97 to 143A-108 Repealed, 143B-2, 143B-6, 150A-1
716	6	143-392
716	7	104E-15, 104E-15 note, 136-4, 136-13 to 136-15, 136-19.4, 136-33, 136-44.1, 136-44.3 to 136-44.11, 136-71.7, 148-18, 148-26, 153A-205
716	8	143B-345 note
718	1	104C-1 to 104C-5 rewritten as 104E-1 to 104E-23, 104E-1 to 104E-23
718	2	131-126.3
718	3	97-2, 97-13
718	4	97-53
718	5	14-288.1
718	6, 7	14-288.8
718	8	104C-1 to 104C-5 note, Ch. 104E note
719	. .	106-579.1 note
719	1-13	106-579.1 to 106-579.13
719	14	106-579.1 note
719	15	106-579.14
719	16	106-569 to 106-579 Repealed, 106-579.1 note
720	1	148-42
720	2	148-49.1, 148-49.6,

Ch.	Sec.	1975 General Statutes
720	2	148-49.8, 148-49.9
720	3	148-58.1, 148-61.1
721	1	150A-1
721	2	143B-261.1
721	4	143B-261.1 note
722	1	18A-38
722	2	105-113.83
723	. .	160A-485
724	. .	115-100.11 note
726	. .	105-39
727	. .	20-85
728	. .	113-262
729	. .	108-77
730	1	148-70
730	2	66-58, 148-8 transferred to 66-58(b)(15)
730	3	66-58, 148-8.1 transferred to 66-58(b)(16)
730	4, 5	66-58
731	1	115-152
731	2	115-155
731	3	115-166
732	. .	59-46
733	. .	90-115.1
734	1-3	166-1.1 to 166-1.3
734	4-6	166-2
734	7	166-3
734	8	166-4 Repealed
734	9, 10	166-5
734	11	166-6.1
734	12	166-8
734	13	166-10
734	14	166-1, 166-2, 166-5 to 166-12
734	15	20-125
734	16	166-8, 166-9, 166-11, 166-12
734	17	153A-149
735	. .	20-118
736	1-3	20-118
737	. .	143-423 to 143-428 note
739	1	105-149
739	2	105-149 note
740	. .	97-12
741	1-8	89D-1 to 89D-8
741	10	89D-9
741	11	89D-10
741	12	89D-1 note
742	1	134-1 to 134-39 rewritten as 134A-1 to 134A-39, 134A-1 to 134A-39
742	2	7A-279
742	3	7A-285
742	4	150A-1
742	5	Ch. 134A note
743	. .	20-4.01
744	. .	163-213.1 to 163-213.9,

Ch.	Sec.	1975 General Statutes
744	. .	163-213.9 note, 163-213.10 Repealed, 163-213.10 note
745	. .	163-41.1
746	1, 2	105-277.2, 105-277.3
746	3-7	105-277.4
746	8	105-277.5
746	9, 10	105-277.6
746	11	105-277.7
746	12	105-324
746	13	105-277.2 note, 105-277.3 note, 105-277.4 note, 105-277.5 note, 105-277.6 note, 105-277.7 note, 105-324 note
747	. .	108-67 to 108-75 Repealed
747	1	108-75.1 to 108-75.24
747	2	143B-153
747	3	108-75.1 note, 143B-153 note
747	4	108-75.25
749	1-3	14-21 note
750	1	116-174
750	2	116-174 note
751	1	130-3
751	2, 3	130-158, 130-159
751	4	130-161
752	. .	105-164.4
753	. .	136-44.6
754	1	135-33
754	2	135-33 note
755	. .	105-275
756	. .	143-295
757	. .	153A-305 L.M.
762	1	1A-1, Rule 5
762	2	1A-1, Rule 26 to 1A-1, Rule 37
762	3	1A-1, Rule 45
762	4	8-84 Repealed, 8-89.1 Repealed
762	5	1A-1, Rule 5 note, 1A-1, Rule 26 to 1A-1, Rule 37 note, 1A-1, Rule 45 note, 8-84 note, 8-89.1 note
763	. .	20-16.1
764	1	130-166.18
764	2	105-122
764	3	105-130.10
764	4	105-130.5
764	5	105-147
764	6	105-275
765	1	93B-5
765	2	93B-5 note
766	1	131A-1 to 131A-25
766	2, 3	131A-1 note
767	1	20-50
767	2	20-86.1
767	3	20-91
768	1	65-18 to 65-36
768	1	rewritten as 65-46 to 65-72, 65-46 to 65-72
769	. .	15-184
770	1, 2	148-45
771	. .	50-5
773	1	90-292 to 90-307
773	2	150-9
773	3	90-292 note
774	. .	18A-17 L.M.
775	1	105-159.1, 105-159.1 note
775	2	163-278.41 to 163-278.43
775	3	105-159.1 note, 163-278.41 note
776	. .	105-60
777	1-5	95-105 to 95-109
777	6	95-105 note
779	. .	14-202.1
780	1	62-110.1
780	2	62-155
782	1, 2	90-95.2, 90-95.3
783	. .	14-100
784	. .	143-215.107
786	. .	20-146.1
787	1	132-1
787	2	132-5.1
787	3	132-9
788	. .	58-3.1
789	. .	163-97.1
790	. .	90-89
791	1	15A-535
791	2	15A-535 note
792	1	105-453.1
792	2	105-453.1 note
793	. .	7A-286.1
796	. .	15-183
797	. .	108-91 to 108-101 Repealed, 108-102 to 108-106.8
798	1	163-135
798	2	163-128
798	3	163-234
798	4	139-6
798	5, 6	163-278.6
798	7, 8	163-278.21, 163-278.22
799	. .	20-109.1
800	1	159C-1 to 159C-24
800	2, 3	159C-25, 159C-26
800	4, 5	159C-1 note
804	1, 2	14-258.1
805	1-4	25A-39 to 25A-42
806	1, 2	14-221.1
806	3	14-221.1 note
807	1	163-41
807	2	163-41 note
808	. .	105-278.6
809	. .	163-140.1
810	1-7	106-65.55 to 106-65.61
810	8	106-65.55 note

Ch.	Sec.	1975 General Statutes
812	. .	105-116
813	1	28A-22-7
813	2, 3	28A-22-7 note
814	. .	50-13.4
815	. .	106-266.19
816	. .	143-532 to 143-539
817	1	97-2
817	2	97-2 note
818	1	15A-503
818	2	153A-225.1
819	. .	90-92
820	. .	120-40 to 120-47 rewritten as 120-47.1 to 120-47.10, 120-47.1 to 120-47.10
821	1	159-48
821	2	159-81
821	3	160A-311
821	4	160A-460
821	5	160A-312
821	6	159-48 note, 159-81 note, 160A-311 note, 160A-312 note, 160A-460 note
822	. .	24-1.3
823	. .	7A-147
824	. .	143-439
825	1	18A-44.1
825	2	18A-44.1 note
826	. .	159C-1 note
827	1	110-128 to 110-141
827	2, 3	110-128 note
828	. .	105-85
829	. .	7A-308
831	. .	20-17
832	. .	97-33
833	1	20-129.2, 20-129.2 note
833	2	20-129.2 note
834	1, 2	115-157
835	1, 2	114-4.2C
835	3	114-4.2C note
836	. .	163-302
837	. .	58-224 to 58-241.5 rewritten as 58-241.6 to 58-241.31, 58-241.6 to 58-241.31
839	. .	122-56.7
840	. .	66-58
841	. .	20-7
842	1	87-95
842	2	143-215.17
842	3	143-215.36
842	4	143-215.33
842	5	143-215.69
842	6	143-215.6, 143-215.114
842	7	143-215.6, 143-215.114
843	1	14-39
843	2	14-39 note
844	1	163-1
844	2	163-106
844	3	163-111
844	4, 5	163-136, 163-137
844	6	163-172
844	7, 8	163-177, 163-177.1
844	9	163-181
844	10	163-188
844	11	163-227
844	12	163-227.2
844	13, 14	163-229, 163-230
844	15-17	163-248
844	19	163-230
845	. .	105-446.1
846	. .	14-87
847	1	40-7.1
847	2	40-7.1 note
848	. .	105-278.3
849	1, 2	153A-302 note
850	. .	53-62
852	1	120-47.3
852	2	120-47.3 note
853	. .	163-107.1
855	1	115-18
855	2	115-18 note
855	3	115-18
856	. .	20-135.4
857	1	88-1
857	2-4	88-13 to 88-15
857	5	88-17
857	6	88-21
857	7	88-25
857	8	88-28
857	9	88-23
857	10	88-28.1
859	1	20-4.01
859	2	20-8
860	. .	126-6.1
862	1	25-1-105
862	2, 3	25-1-201
862	4	25-2-107
862	5	25-5-116
862	6	25-9-201.1 Repealed
862	7	25-9-101 to 25-9-114, 25-9-201, 25-9-202 to 25-9-208, 25-9-301 to 25-9-318, 25-9-401 to 25-9-408, 25-9-501 to 25-9-509, 25-9-601 to 25-9-607
862	8	25-11-101 to 25-11-108
862	10	25-9-114 note, 25-9-408 note
863	. .	20-1
864	1	122-35.33, 122-35.34
864	2	122-35.33 note
865	. .	20-81, 20-81 note
866	1-4	20-279.21
866	5	1B-3
867	1, 2	62-10
867	3	62-21

1975

Ch.	Sec.	General Statutes
867	4	62-37
867	5	62-78
867	6	62-81
867	7	62-134
868	1, 2	161-5
870	1, 2	14-415.1
870	3	14-415.2 Repealed
871	1	20-24
871	2	20-24 note
875	4	20-7, 20-7 note, 20-85, 20-85 note, 20-183.7
875	8	136-44.2A
875	11	58-194.2
875	16	143B-139.2
875	45	143B-139.1
875	47	135-4, 135-5
875	64	58-194.2 note, 136-44.2A note, 143B-139.1 note, 143B-139.2 note
877	1	Ch. 113B note
877	2	62-2
877	3	113B-1
877	4	113B-2 to 113B-12, 113B-20 to 113B-24
877	5	62-2 note, Ch. 113B note
877	6	Ch. 113B note
878	. .	47-53.1
879	2-8	143B-366 to 143B-372
879	9	143-476 to 143-482 Repealed
879	10, 11	143B-373, 143B-374
879	12	129-31 to 129-39 Repealed
879	13, 14	143B-375, 143B-376
879	15	105-60, 110-86, 110-87 Repealed, 110-88, 110-89 Repealed, 110-90 to 110-97, 110-98 note, 110-100 to 110-102
879	16, 17	143B-377, 143B-378
879	18	143-471 to 143-475 Repealed
879	19-24	143B-379 to 143B-384
879	25	143-178 to 143-185 Repealed
879	26-29	143B-385 to 143B-388
879	30	143-283.24 to 143-283.30 Repealed, 143-283.32 Repealed
879	31, 32	143B-389, 143B-390
879	33	143-347.1 to 143-347.5 Repealed
879	34, 35	143B-391, 143B-392
879	36	143-416 to 143-422 Repealed
879	37, 38	143B-393, 143B-394
879	39	143-423 to 143-428 Repealed

1975

Ch.	Sec.	General Statutes
879	40, 41	143B-395, 143B-396
879	42	143-283.41 to 143-283.48 Repealed
879	43, 44	143B-397, 143B-398
879	45	143-61 Repealed
879	46	7A-6, 20-7, 20-85, 66-58, 95-59, 115-17, 115-126, 115-188, 116-209.19, 121-26, 129-40, 129-42.2, 129-44, 129-50 to 129-70 Repealed, 130-59, 135-8, 136-102.3, 143-31.1, 143-34.3, 143-48, 143-49, 143-50 to 143-52, 143-53, 143-55 to 143-60, 143-63, 143-63.1, 143-64.1, 143-64.3, 143-64.21, 143-64.21 note, 143-64.22, 143-64.22 note, 143-129, 143-135, 143-135.3, 143-135.4, 143-267, 143-268, 143-270, 143-271, 143-336, 143-337 to 143-339 Repealed, 143-340, 143-341, 143-343 note, 143-344 note, 143-345.4, 143-368, 143A-80 to 143A-96 Repealed, 143B-2, 143B-6, 146-69, 146-70, 147-45, 147-58, 148-37, 160A-221, 160A-243, 160A-274
879	47	143B-13
881	1	105-316.1 to 105-316.8
881	2	105-277.1
881	3	105-309
881	4	105-316.1 note, 105-316.2 note, 105-316.3 note, 105-316.4 note, 105-316.5 note, 105-316.6 note, 105-316.7 note, 105-316.8 note
882	. .	115A-5
885	. .	143-215.84
887	1-5	143-64.20 to 143-64.24
887	7	143-64.20 note
889	. .	136-76.1
891	. .	90-216.12
892	1	138-6
892	2	138-6 note
894	1	108-54 to 108-57 note
895	1-11	95-69.8 to 95-69.18
895	13	95-69.8 note
896	. .	115-315.23 to 115-315.26
900	1	106-284.33

Ch.	Sec.	1975 General Statutes
900	2	106-284.40
903	1	114-32
916	1, 2	143-300.1
917	2-7	127A-190 to 127A-195
917	9	127A-190 note
929	. .	7A-278 note, 7A-289.13 to 7A-289.16, 143B-207, 143B-208
945	1	130-9.1
945	3	130-9.1 note
953	1	48-1 note
953	3	48-39 to 48-39.2
953	4	48-39 note, 48-39.1 note, 48-39.2 note
956	1, 2	7A-41
956	3	7A-44.1
956	4	7A-60
956	5	7A-66.1
956	6	7A-69
956	7	7A-101
956	8	7A-133
956	9	7A-133 note
956	10	7A-133
956	11	7A-177
956	12	7A-344
956	13	7A-375
956	14	7A-465
956	15, 16	7A-466
956	17	135-84, 135-85
956	18	7A-500 to 7A-505 Repealed, 7A-500 to 7A-505 note
956	20	7A-44.1 note, 7A-69 note, 7A-177 note, 135-84 note
958	1-12	106-65.67 to 106-65.78
958	13	106-65.67 note, 106-65.74 note
958	14, 15	106-65.67 note
961	1	106-284.33
961	2	106-284.40
965	1, 2	115-206.24
965	3	115-59
965	6	115-206.24 note
972	1	130-166.16 note
974	. .	143B-209
974	1	130-9.2
975	. .	115-11

SESSION LAWS 1975, 2nd SESSION

Ch.	Sec.	General Statutes
976	. .	116-219 to 116-222
977	1, 2	1-15
977	3	1-17
977	4	90-21.11 to 90-21.14
977	5	1A-1, Rule 8
977	6	58-21.1
977	7, 8	1-15 note, 1-17 note, 1A-1, Rule 8 note, 58-21.1 note, 90-21.11 note
977	10	58-21.1 note, 90-21.11 note
978	1, 2	58-254.19
978	3	58-254.20 to 58-254.29
978	4	58-254.19 note
979	1	105-163.6
980	1	7A-304
980	2, 3	7A-305
981	1	55-155
981	2	55A-77
982	. .	105-164.13
983	11	7A-101
983	12	7A-172
983	13	7A-44
983	14	147-35
983	15	147-55
983	16	147-65
983	17	115-13
983	18	114-7
983	19	106-11
983	20	95-2
983	21	58-6
983	30	146-30, 146-30 note
983	37-40	134A-7 note
983	41	134A-5
983	43	115-352 to 115-357 Repealed
983	44	115-11 note
983	57	116-43.1, 116-43.1 note
983	61, 62	150A-2
983	63	150A-12
983	64	150A-14
983	65	150A-23
983	66	150A-27
983	67	150A-36
983	68	75A-16
983	69	93-12
983	70	113-221
983	71	113-301
983	72	143-215.20
983	74	113A-54
983	75, 76	113A-107
983	77, 78	113A-114, 113A-115
983	79, 80	115-179.1
983	81	95-131
983	82	143-215.97
983	83	143-224
983	84	143-463

Ch.	Sec.	1975, 2nd Sess. General Statutes
983	85	122-16.1
983	89	115-205.14
983	92	136-14.2
983	93	20-63 note
983	113	7A-102 note
983	114	7A-41
983	115	147-45
983	122	143-48 note
983	124	143-34.5
983	125	128-21
983	126-128	128-27
983	129, 130	128-30
983	132	55C-1 to 55C-4
983	133	122-58.7A
983	134	15A-131
983	135	15A-141
983	136, 137	15A-301
983	138	15A-303
983	139, 140	15A-601
983	141	15A-511
983	142	15A-521
983	143	15A-630
983	144	15A-1026
983	152	55C-1 note, 122-58.7A note, 136-14.2 note, 143-34.5 note

SESSION LAWS OF 1977

Ch.	Sec.	General Statutes
1	. .	153A-335 L.M.
2	. .	1-370
3	1	49-2
3	2	49-7
4	1-3	110-86
4	4	110-93
4	5	110-104
4	6	110-98.1
4	7	105-60
6	. .	20-7 note
7	. .	90-271
9	. .	14-344
11	1-3	143B-337 to 143B-339 recodified as 143B-478 to 143B-480, 143B-478 to 143B-480
11	4	143B-477
11	5	143B-337 note
11	7	143B-477 note, 143B-478 note, 143B-479 note, 143B-480 note
12	. .	1-84
18	1, 2	18A-56
18	3	18A-56 note
19	. .	163-213.2
21	1, 2	7A-66
23	1	113B-2, 113B-3, 113B-11, 113B-21
23	2	113B-2
23	3	143B-254 Repealed, 143B-255 Repealed
23	4	143B-448, 143B-449
23	5	113B-3
23	6	143B-448 note, 143B-449 note
24	. .	135-33
25	. .	15A-1002
26	. .	96-14
27	1	160A-44
27	2	160A-44 note
29	. .	28A-8-1
30	. .	32-27
31	. .	90-21.20, 90-21.21
35	. .	7A-109 note, 14-402 note, 14-409.1 note
36	. .	153A-103
40	1	55-164.2
40	2	55-164.2 note
42	. .	106-285 to 106-302 Repealed
44	. .	115-18 L.M., 115-19 L.M., 115-20 L.M., 115-22 L.M., 115-23 L.M., 115-24 L.M.
50	1	47-30
52	1	20-125
52	2	20-130.1
52	3	20-145
52	4	20-156
53	. .	55B-2
56	. .	160A-241 L.M.
63	. .	14-111.2
64	. .	44-51.8
65	1	143B-452
65	2	143B-454
65	3	143B-353 Repealed
65	4	143B-451
65	5	143A-185.1
66	. .	14-289 L.M.
70	1	143A-239 to 143A-245, 143B-473 to 143B-476
70	2	127A-19 to 127A-22, 127A-35, 127A-40,

Ch.	Sec.	1977 General Statutes
70	2	127A-80, 127A-81, 127A-107, 127A-139, 127A-161 to 127A-164, 127A-192, 127A-195
70	3	127A-17.1
70	5	167-2
70	6—8	20-185
70	9	20-186
70	10	20-188
70	11	20-191
70	12	20-194
70	13	20-184, 20-185, 20-187, 20-187.1, 20-188, 20-189, 20-195, 20-196
70	14	20-184, 20-195, 20-196
70	14.1	20-196.3
70	15	20-184, 20-190, 20-192
70	15.1	18A-15
70	15.2	18A-15
70	17	18A-19
70	18	18A-22
70	19	18A-38
70	19.1	18A-39
70	20	18A-41
70	20.1	18A-47
70	20.2	18A-47
70	20.3	18A-47
70	20.4	18A-48
70	20.5	18A-50
70	21	18A-54
70	21.1	18A-55
70	22	143B-2
70	23	143B-6
70	24	143B-252 transferred to 143B-399, 143B-399; 143B-253 transferred to 143B-400, 143B-400
70	25	143B-399, 143B-400
70	26	143A-96.1
70	27	143B-399, 143B-400, 165-1 to 165-3, 165-8, 165-11, 165-20, 165-22, 165-22.1
70	28	165-11.1
70	29	17A-3
70	30	17A-3
70	31	17B-4
70	32	143-323
70	33	143B-246 to 143B-251 Repealed
70	34	17A-3 note, 17B-4 note, 18A-15 note, 18A-19 note, 18A-22 note, 18A-38 note, 18A-39 note, 18A-41 note, 18A-47 note, 18A-48 note, 18A-50 note, 18A-54 note, 18A-55 note, 20-184 note, 20-185 note, 20-186 note, 20-187 note, 20-187.1 note, 20-188 note, 20-189 note, 20-190 note, 20-191 note, 20-192 note, 20-194 note, 20-195 note, 20-196 note, 20-196.3 note 127A-17.1 note, 127A-19 note, 127A-20 note, 127A-21 note, 127A-22 note, 127A-80 note, 127A-81 note, 127A-107 note, 127A-139 note, 127A-161 note, 127A-162 note, 127A-163 note, 127A-164 note, 127A-192 note, 127A-195 note, 143-323 note, 165-1 to 165-3, 165-8, 165-11, 165-20, 165-22, 165-22.1, 143A-289 note, 143B-2 note, 143B-6 note, 143B-399 note, 143B-400 note, 143B-473 note
70	35, 36	143B-473 note
70	37	127A-17.1 note,

Ch.	Sec.	1977 General Statutes
70	37	143A-96.1 note, 143A-289 note, 143B-473 note, 165-11.1 note
70	38	127A-35 note, 127A-40 note
71	. .	18A-16 L.M.
72	. .	7A-109 note, 14-402 note, 14-409.1 note
74	1	1-310
74	2	8-51
74	3	31-5.4
74	4	44A-4
74	5	1-310 note, 8-51 note, 31-5.4 note, 44A-4 note
76	. .	160A-514 L.M.
81	1	1-389
81	2	1-389 note
82	. .	110-12
83	1	49-10
83	2	49-14
86	1	7A-211.1
86	2, 3	7A-211.1 note
88	. .	147-62
92	. .	105-308
93	. .	163-254 to 163-256
95	1, 2	163-42
96	. .	14-111.3
97	. .	160A-274 L.M.
98	. .	153A-335 L.M.
99	1	53-77.1
99	2	53-77.2A
100	. .	143-452
102	1	35-7 Repealed
102	2	35-13
102	3	35-19
102	4	35-7 note, 35-13 note, 35-19 note
103	. .	25-9-302
104	. .	20-130
105	1	131-3
105	2	131-3 note
106	. .	113-126.2
107	1	51-3
107	2	51-3.1
109	. .	58-173.27
110	. .	47-32.2
111	. .	47-32
115	1	58-205 note
116	1, 2	20-12.1
119	. .	143-340
120	1—3	143-254.2
121	. .	7A-133
122	. .	7A-133
123	. .	130-166.18
124	1	161-29.1
124	2, 3	161-29.1 note
125	. .	20-179
126	. .	14-401.6
127	. .	130-58.1
128	. .	58-291
130	1	163-74
130	2	163-74 note
131	1	69-25.17
131	2	69-25.17 note
132	1—3	106-406
132	4	106-407.1
138	. .	44-51.8
139	. .	115-29 L.M.
143	. .	87-28 to 87-38 Repealed
144	. .	14-111.2
146	. .	95-17
148	1	24-11
148	2	113-155
148	3	143-58
148	4	74A-1, 74A-2
148	5	74A-5, 153A-149
148	6, 7	160A-38
149	1	18A-52
149	2	18A-52 note
150	. .	18A-56 note
154	1	115A-4
154	2	115A-4.1
155	. .	88-1
156	. .	25-9-403
157	. .	14-289 L.M.
158	. .	153A-233
160	. .	130-87
162	. .	78A-17
163	1	130-36
163	2	130-42.1
165	. .	47-108.11
166	1	90-220.2
166	2	90-220.4
166	3	90-220.5
166	4, 5	90-220.6
166	6	90-220.7
167	. .	113-126.2
168	. .	108-75.24 L.M.
176	1	18A-7, 18A-26 to 18A-30, 18A-32, 18A-34
176	2	18A-7, 18A-15, 18A-27 — 18A-29, 18A-34, 18A-35
176	3	18A-7, 18A-34, 18A-35
176	4	18A-28
176	5	18A-31.1
176	6	18A-15
176	7	18A-41
176	8	18A-40
176	9	18A-44.1
178	. .	131-98
180	. .	161-5
182	1	18A-38
182	2	18A-52
183	. .	130-129
185	. .	58-3.1

Ch.	Sec.	1977 General Statutes
186	. .	15A-1023
187	1	160A-497
187	2	160A-209
189	. .	130-198 L.M.
191	1	113-98.1
191	2	113-98.1 note
192	1—4	58-210
193	1	55A-86 Repealed
193	2	55A-33.1
193	3	55A-33.1 note
198	1	143B-427 to 143B-434, 143B-438
198	2	143B-440, 143B-441
198	3, 4	143B-443
198	5	143B-446, 143B-447
198	7	143B-454
198	8	143B-461
198	9	143-216 recodified as 143B-452, 143B-452; 143-217 recodified as 143B-453, 143B-453; 143-218 recodified as 143B-454, 143B-454; 143-218.1 recodified as 143B-455, 143B-455; 143-219 recodified as 143B-456, 143B-456; 143-220 recodified as 143B-457, 143B-457; 143-221 recodified as 143B-458, 143B-458; 143-222 recodified as 143B-459, 143B-459; 143-223 recodified as 143B-460, 143B-460; 143-224 recodified as 143B-461, 143B-461; 143-225 recodified as 143B-462, 143B-462; 143-226 recodified as 143B-463, 143B-463; 143-227 recodified as 143B-464, 143B-464; 143-227.1 recodified as 143B-465, 143B-465; 143-228 recodified as 143B-466, 143B-466; 143-228.1 recodified as 143B-467, 143B-467
198	10	143B-276
198	11, 12	143B-277
198	13	143B-305
198	14	143B-305 to 143B-307
198	15	113-3
198	16, 17	113-8
198	18	113-14.1
198	19	143B-437
198	20	143B-435, 143B-436
198	21	143B-2
198	22	143B-6
198	23	159C-4, 159C-7, 159C-8
198	24	159C-1 note
198	25	143A-171 to 143A-180 Repealed, 143A-182 to 143A-185.1 Repealed
198	26	113-14 recodified as 143B-435, 143B-435; 113-15 recodified as 143B-436, 143B-436; 143-15.2 recodified as 143B-437, 143B-437; 143-374 recodified as 143B-442, 143B-442; 143-375 recodified as 143B-443, 143B-443; 143-376 recodified as 143B-444, 143B-444; 143-377 recodified as 143B-445, 143B-445; 143A-180.1 recodified as 143B-448, 143B-448; 143A-180.2 recodified as 143B-449, 143B-449; 143A-181 recodified as 143B-439, 143B-439; 143B-322 to 143B-324 recodified as 143B-446 to 143B-447.1, 143B-446 to 143B-447.1; 143B-331 recodified as 143B-440, 143B-440; 143B-332 recodified as 143B-441, 143B-441; 143B-354 recodified as 143B-451, 143B-451
198	28, 29	143B-427 note
198	31	113-3 note, 113-8 note, 113-14 note, 113-14.1 note, 113-15 note, 113-15.2 note, 143B-2 note, 143B-6 note, 143B-276 note, 143B-277 note, 143B-305 note, 143B-306 note, 143B-307 note, 143B-427 note, 143B-435 note, 143B-436 note, 143B-437 note, 143B-440 note, 143B-441 note, 143B-443 note, 143B-446 note, 143B-447 note, 143B-447.1 note, 143B-448 note, 143B-449 note, 143B-451 note, 143B-452 note, 143B-453 note,

Ch.	Sec.	1977 General Statutes
198	31	143B-454 note, 143B-455 note, 143B-456 note, 143B-457 note, 143B-458 note, 143B-459 note, 143B-460 note, 143B-461 note, 143B-462 note, 143B-463 note, 143B-464 note, 143B-465 note, 143B-466 note, 143B-467 note, 159C-4 note, 159C-7 note, 159C-8 note
199	. .	143-437
201	1	159-72
201	2	159-78
201	3	159-84
201	4	159-123
203	. .	160A-233 L.M.
217	. .	62-260
218	1	163-221
218	2	163-221 note
219	1	62-152.1
219	2	62-152.1 note
220	1	9-2.1
220	2	9-2.1 note
221	1	47-30
221	2	47-32
221	3	47-32.2
223	. .	7A-109 note, 14-402 note, 14-409.1 note
227	. .	20-81.4
228	1, 2	127A-192, 127A-193
228	3, 4	127A-194
229	1, 2	127A-45.1, 127A-45.2
230	1—3	127A-42 to 127A-44
231	1	106-65.22
231	2	106-65.23
231	3—5	106-65.24
231	6	106-65.27
231	7, 8	106-65.28
231	9	106-65.28, 106-65.29
231	10	106-65.30
231	11	106-65.33
231	12	106-65.38
231	13	106-65.39
232	. .	160A-323
233	1—14	106-50.28 to 106-50.41
233	15	106-50.28 note
235	. .	7A-109 note, 14-402 note, 14-409.1 note
236	1	55A-15
236	2	55A-17.1 to 55A-17.3
238	1—11	106-634 to 106-644
238	12	106-634 note
239	. .	130-166.29
240	. .	14-234
242	1	143B-180
242	2	143B-181
242	3	143B-140
242	4	143B-181.1, 143B-181.2
243	1	20-220 — 20-231 Repealed
243	2	20-231.1
244	1, 2	7A-304 note, 7A-305 note
245	. .	135-20 L.M., 143-166 L.M.
253	..	153A-335 L.M.
259	..	115-29 L.M.
265	1	163-1
265	2	163-10
265	3	163-72.1
265	4, 5	163-106
265	6	163-107
265	7, 8	163-109
265	9	163-111
265	10	163-140
265	11	163-154
265	12	163-169
265	13	163-175
265	14	163-177
265	15	163-180
265	16	163-247
265	17	163-251
265	18	163-294.2
265	19	163-303 Repealed
265	21	163-35
266	1	14-225.1
266	2	14-225.1 note
267	..	131A-4
268	..	131-110
277	..	143-129 L.M., 143-131 L.M.
278	..	128-24 L.M.
285	..	118-1 L.M.
288	1	126-4
288	2	143-340
289	..	118-1 note
290	..	1A-1 Rule 41
291	1-3	7A-278
293	..	153A-159 L.M.
294	..	105-61.1, L.M., 105-86, L.M.
295	..	25-9-403
297	..	148-22
298	..	115-55
303	1-23	106-655 to 106-677
303	24	106-50.1 to 106-50.22 Repealed
303	25	106-655 note
304	..	20-79.3

Ch.	Sec.	1977 General Statutes
305	1	47-30 L.M.
305	2	47-30
306	..	136-72
307	1	153A-97
307	2	160A-167
309	1-4	105-149
310	..	161-10
311	1	65-13
311	2	65-13 note
312	..	118-1 L.M.
313	..	20-4.01
314	..	115-188.1
315	..	105-152,
316	2	128-21
317	..	135-4
318	..	128-36.1
319	..	20-183.10
320	..	50-11.3
327	1	105-311
327	2	105-360
327	3	105-324
329	1-3	20-185
329	4	20-185 note
332	..	148-19
334	..	118-1 L.M.
335	..	14-401.5
336	..	153A-301 L.M.
337	..	20-66
338	1	136-19.1 Repealed
338	2	136-19.1 note
340	1	20-37.5
340	2	20-37.6
340	3	20-7
340	4	20-88.1
340	5	20-37.6 note
341	1	136-44.20 note
341	2	136-44.20
342	..	141-7 Repealed
343	..	58-155.48
344	1	120-77
344	2	11-7.1, 120-19.4
344	3	11-11
344	4	14-211
344	5	120-32.4
344	6	120-32.4 note
345	1, 2	163-152 7A-109 note
347	..	14-402 note, 14-409.1 note
348	..	152-1 L.M.
351	..	160A-49 L.M.
353	..	118-1 L.M.
354	..	20-7 note
355	..	66-58
356	..	113-315.5
357	..	44-51.8
359	1	45-21.12
359	2-10	45-21.16
359	11-14	45-21.17
359	15	45-21.30
359	17	45-21.12 note,
359	17	45-21.16 note,
359	17	45-21.17 note,
359	17	45-21.30 note
359	18	45-21.12 note,
359	18	45-21.16 note,
359	18	45-21.17 note,
359	18	45-21.30 note
360	..	105-307
361	1	91-4
361	2	91-5
361	3	91-4 L.M.
362	..	108-39
364	..	15-199
366	..	146-6.1 Repealed
367	..	20-141
368	..	90-29
369	..	44A-12
370	1	20-84
370	2	20-84.1
371	..	18A-52 L.M.
372	1	105-466
372	2	105-466 L.M.
373	..	90-220.11
374	1	143-215.4
374	2	143-215.56
375	1	52-6 Repealed
375	2	52-10
375	3	52-10.1
375	4	7A-292
375	5	10-5
375	6	29-19
375	7	39-12
375	8	39-13.2
375	9	39-13.3
375	10	39-13.4
375	11	39-13.5
375	12	47-3, 47-5, 47-9, 47-12, 47-12.1, 47-13, 47-18
375	13	52-2
375	14	52-9
375	15	52-8
375	16	39-10 Repealed, 47-39 Repealed
375	17	7A-292 note, 10-5 note, 29-19 note, 39-10 note, 39-12 note, 39-13.2 note, 39-13.3 note, 39-13.4 note, 39-13.5 note, 47-3 note, 47-5 note, 47-9 note, 47-12 note, 47-12.1 note,

Ch.	Sec.	1977 General Statutes
375	17	47-13 note, 47-38 note, 47-39 note, 52-2 note, 52-6 note, 52-8 note, 52-9 note, 52-10 note, 52-10.1 note
376	1	58-9
376	2	58-63
377	..	147-50
378	..	147-54
379	1	147-45
379	2	7A-343.1
382	..	153A-60
383	1	1-76.1
383	2	1-76.1, note
384	..	66-68
385	2	159B-4
385	3, 4	159B-9
385	5	159B-10
385	6-10	159B-11
385	11	159B-13
385	12	159B-27
385	13	159B-35
386	..	163-107.1
387	..	139-7
388	..	115-131 L.M.
389	..	7A-4.21
390	..	97-85
391	..	161-16 L.M.
395	1	58-205.3
395	2	58-205.3 note
397	1, 2	126-18
398	1	61-7
398	2	14-401.9
399	..	18A-52 L.M.
400	1—8	122-58.1 to 122-58.8
400	9	122-58.11
400	10	122-58.19
400	11	122-58.12
400	12	122-58.2
400	13	122-58.19 note
401	1	147-69
401	2	147-75
402	1, 2	159-48
402	3	159-49
403	..	159-140
404	1	159-161
404	2	159-161 note
405	..	142-1
406	1	14-17
406	2	15A-2000 to 15A-2003
406	3—5	9-18
406	6	14-17 note, 15A-2000 note
406	7	9-18 note, 14-17 note, 15A-2000 note
406	8	9-18 note, 14-17 note, 15A-2000 note
407	1	153A-131
407	2	160A-187
408	1	163-97.1
408	2	163-106
408	3	163-122
408	4	163-137
408	5	163-140
409	..	97-38
410	..	119-49
414	1	122-58.20
417	..	18A-16 L.M.
419	..	97-2
420	..	20-97 L.M.
421	..	106-134.1
424	..	75A-15
425	1, 2	146-27
426	1	106-266.6
426	2, 3	106-266.8
426	4	106-266.18
428	..	51-9
429	1, 2	10-8
430	..	84-4.1
431	..	97-85
433	1	20-97
433	2	20-97 note
437	..	14-271 L.M.
438	1	20-125
438	2	20-130.1
438	3	20-156
440	1	14-190.2
440	2	14-190.7
440	3	14-190.8
440	4	14-190.2 note, 14-190.7 note, 14-190.8 note
446	1	28A-13-6, 28A-14-1, 28A-14-3 note, 28A-19-1 to 28A-19-4, 28A-21-1, 28A-21-2, 28A-23-1
446	2	1-22
446	3	1A-1 Rule 25
446	4	12-3
446	5	1-22 note, 1A-1 Rule 25 note, 12-3 note, 28A-13-6 note, 28A-14-1 note, 28A-14-3 note, 28A-19-1 note, 28A-19-2 note, 28A-19-3 note, 28A-19-4 note, 28A-21-1 note, 28A-21-2 note, 28A-23-1 note

Ch.	Sec.	1977 General Statutes
450	1	148-30
450	2	148-32 Repealed
450	3	148-32.1
450	4, 5	148-33.1
450	6, 7	148-60.3
450	9	148-32.1 note
453	..	163-45
455	1	160A-56 note
456	..	97-80
457	..	97-40.1
458	. .	90-216.6
460	1	136-18
460	2	136-18 note
461	..	20-118
462	1	143B-170
462	2	143B-173
462	3	143B-174
463	1	33-68
463	2	33-74
464	2	143B-346
464	3	143B-347 Repealed
464	4	143B-348
464	5	143B-349 Repealed
464	6	143B-350
464	7	143B-351 Repealed, 143B-352 Repealed
464	7.1	136-10 to 136-14, 136-16, 136-17.2, 136-18 to 136-19, 136-19.3 to 136-21, 136-25 to 136-27, 136-28.1, 136-28.2, 136-29 to 136-30.1, 136-32, 136-32.2, 136-33, 136-33.1, 136-34, 136-35, 136-41.1, 136-41.3, 136-42.2, 136-42.3, 136-44, 136-44.2, 136-45, 136-51, 136-55, 136-55.1, 136-62, 136-64, 136-64.1, 136-66.1 to 136-66.5, 136-67, 136-72, 136-76.1, 136-81, 136-82, 136-84 to 136-89, 136-89.49 to 136-89.56, 136-89.58, 136-89.59, 136-93, 136-97, 136-98, 136-102.2, 136-102.5, 136-102.6, 136-103, 136-104 to 136-106, 136-108, 136-109, 136-111, 136-116 to 136-125, 136-128, 136-129, 136-130 to 136-134, 136-136 to 136-140, 136-143
464	7.1	to 136-155
464	8	136-44.7, 136-44.10, 136-102.6
464	9	136-44.8
464	10	136-13
464	10.1	136-13, 136-13.1
464	10.2	136-14
464	11	136-4, 136-20
464	13	136-17.1 Repealed
464	14	136-18
464	15	136-20
464	16	136-28.1
464	17	136-32.2
464	18	136-33
464	19	136-34
464	20	136-41.3
464	21	136-44.10
464	22	136-46 Repealed, 136-47 Repealed, 136-52 Repealed, 136-53 Repealed, 136-58 Repealed, 136-83 Repealed, 136-89.31 to 136-89.47 Repealed,
464	23	136-54
464	24, 24.1	136-62
464	25	136-63
464	26	136-105
464	27	136-82.1
464	28	136-106
464	29	136-111
464	30	136-115
464	31	136-130
464	32	136-133 to 136-135, 136-149.1
464	33	136-134.1, 136-149.1
464	34	14-128, 20-4.01, 20-81.1, 20-81.3, 20-81.5, 20-81.6, 20-115, 20-116, 20-118, 20-118.2, 20-119, 20-121, 20-122, 20-123, 20-130.2, 20-141, 20-143, 20-144, 20-150, 20-153, 20-158, 20-158.1, 20-165.1, 20-166, 20-175, 20-183.9,

Ch.	Sec.	1977 General Statutes
464	34	20-190.2, 20-194, 20-196, 20-212, 20-215, 47-27, 58-190, 74-67, 87-9, 105-86, 143-134, 143-291, 146-26.1, 153A-241, 153A-242, 153A-291, 156-88, 160A-274, 160A-299, 162A-54, 162A-74
464	35	113A-54
464	36	114-4.2
464	37	20-183.9
464	38	121-4
464	39, 40	136-44.3, 136-44.4
464	41	143B-390
464	42	136-18
465	. .	160-496.1 to 160-496.14
466	1	162A-86 to 162A-92
466	2	159-44
466	3	159-81
467	1	131-53.1
467	2	131-54
467	3	131-56 Repealed
467	4	131-58
467	5	131-61.1
467	6	131-72
467	7	131-73
467	8	131-74
467	9	131-76
467	10	131-77
467	11	131-78.1 Repealed
467	12	131-80
467	13	131-81
467	14	131-82.1 Repealed
467	15	131-127
467	16	131-133
468	1	62-10
468	2	62-13
468	3	62-14
468	4	62-15
468	5	62-16 Repealed
468	6	62-17
468	7	62-19
468	8	62-20
468	9	62-21 Repealed
468	10	62-34
468	11	62-48
468	12	62-51
468	13	62-60.1
468	14	62-70
468	15	62-81
468	16	62-327
468	17	114-2
468	21	62-10 note, 62-13 note, 62-14 note, 62-15 note, 62-16 note, 62-17 note, 62-19 note, 62-20 note, 62-21 note, 62-34 note, 62-48 note, 62-51 note, 62-60.1 note, 62-70 note, 62-81 note, 62-327 note
468	23	62-15 note, 62-34 note, 62-51 note, 62-70 note, 62-327 note
468	24	62-327 note
469	1	163-226 to 163-234, 163-236 to 163-239
469	2	163-226.1 note, 163-226.2 note
470	. .	20-141
472	. .	88-1
473	1, 2	54-33.3
474	. .	153A-248
475	1	163-302
475	2	163-302 note
478	1	160A-44 L.M.
478	2	160A-25 L.M.
478	3	160A-360 L.M.
480	. .	47-30.1 L.M.
481	. .	74B-3
482	1	90-114
482	2	90-118
482	3	90-118.10
482	4	90-118.11
482	5	90-127.2
482	6	90-87
482	7	90-87 note, 90-114 note, 90-118 note, 90-118.10 note, 90-118.11 note, 90-127.2 note
482	8	90-127.2 note
483	. .	139-28
485	. .	146-25.1
486	. .	105-144.1
487	. .	105-147
488	. .	105-163.6
490	1	115-229 to 115-235.1 Repealed
490	2	115-235.2 to 115-235.8
490	3	115-240 to 115-242 Repealed
490	4	115-235.14 to 115-235.20
493	. .	113-104
496	. .	113-111
497	. .	143B-151 Repealed, 143B-152 Repealed
498	. .	75-27
499	1	113-100
499	2	113-100 note
501	1	50-5
501	2	50-13.2
501	3	50-5 note, 50-13.2 note
502	1	36-1 to 36-67 Repealed
502	2	36A-1 to 36A-7, 36A-13 to 36A-16,

Ch.	Sec.	1977 General Statutes
502	2	36A-22 to 36A-41, 36A-47 to 36A-54, 36A-60 to 36A-84, 36A-90 to 36A-94, 36A-100, 36A-101, 36A-107
502	3	Ch. 36A note
503	1-3	120-112 to 120-114
503	4	120-112 note
503	6	120-112 note
505	. .	97-80
506	. .	116-36
507	1	106-65.73
507	2, 3	106-65.74
507	4, 5	106-65.75
508	. .	25A-23
509	. .	143-510
510	. .	143B-386
511	. .	97-27
512	1	143B-287
512	2	143B-287 note
512	3	143B-289
512	4	143B-325, 143B-327
512	5	113-128
512	6	143B-277
513	1	143B-63
513	2	143B-62
514	1	153A-274
514	2	160A-311
515	1	113-207
515	3	113-207 note
516	. .	143B-154
517	2	160A-24
517	3	160A-28
517	4	160A-31
517	5	160A-37
517	6	160A-49
517	7	160A-58.3
517	9	160A-58.10
517	10	105-380 note, 160A-24 note, 160A-31 note, 160A-37 note, 160A-49 note, 160A-58.3 note, 160A-58.10 note
517	11	160A-24 note, 160A-31 note, 160A-37 note, 160A-49 note, 160A-58.3 note, 160A-58.10 note
518	1	58-205
518	2	58-205 note
519	. .	95-87
520	1	69-7.1
520	2	69-7.1 note
521	1	97-86
521	2	97-86.1
521	3	97-86.1 note
522	1-8	115-320.6 to 115-320.13
523	1	116-222
523	2	116-220.1, 116-220.2, 116-223
523	3	116-223 note, 116-224 note, 116-225 note
529	1-3	143-291 note
531	1	143-151.8 to 143-151.20
531	2, 3	153A-351
531	4	153A-351.1
531	5	160A-411
531	6	160A-411.1
531	7	143-151.8 note, 153A-351 note, 153A-351.1 note, 160A-411.1 note
532	1	113A-1 note
534	. .	160A-288
535	. .	74B-4
537	1, 2	108-60 note
538	. .	47-71.1
539	. .	115-45.1
541	1-9	115-320.19 to 115-320.27
541	11	115-320.19 note
542	1, 2	24-1.1A
542	3	24-1.1A note
543	1	54A-1 to 54A-3, 54A-9 to 54A-12, 54A-18 to 54A-20, 54A-26, 54A-27
543	2	54-1
543	3	54A-1 note
544	1, 2	130-143
545	. .	1-223
546	. .	7A-104
547	. .	8-56
548	. .	20-187.2
549	. .	23-18
550	1	94-7
550	2	94-8
551	1	110-1
551	2	110-2
551	3	110-7
551	4	110-8
552	. .	110-64
553	. .	127A-80
554	. .	147-32
555	. .	113A-35.1
556	. .	28A-13-3
557	. .	15A-773
558	. .	18A-16 L.M.
559	1	54-109.11
559	2, 3	54-109.14
559	4	54-109.16
559	5	54-109.21
559	6	54-109.60 Repealed
559	7	54-109.82
559	8	54-109.88
559	9	54-109.92
559	10	54-109.18
559	11	54-109.18 note
560	1	20-286
560	2	20-288

Ch.	Sec.	1977 General Statutes
560	3	20-294
561	. .	135-5
562	1-8	113A-176 to 113A-183
562	9, 10	113A-176 note
563	1-4	116-15
564	. .	135-6
565	. .	19A-10 L.M.
566	. .	75A-5
568	1	122-35.35 to 122-35.57
568	2, 3	143B-147
568	4	122-35.1 to 122-35.12A Repealed, 122-35.18 to 122-35.23A Repealed, 122-35.33 Repealed, 122-35.34 Repealed
568	5	122-35.35 note
569	. .	8-45.1
570	1	74B-15
570	2	74B-10
570	3	74B-13.1
571	. .	114-20
572	1, 2	20-81.2
573	1-8	113A-189 to 113A-196
573	9, 10	113A-189 note
574	1	135-1
574	2	135-1 note
575	. .	159-30
576	. .	6-21
577	. .	14-46
578	1	54-44.8
578	2	54-44.10
578	3	54-44.11
578	4	54-44.14
579	. .	136-44.30 to 136-44.34 Repealed
580	1	57A-1 to 57A-29
580	2	57A-1 note
581	. .	143B-158
582	1	90-21.4
582	2	90-21.5
582	3	90-21.4 note, 90-21.5 note
583	1, 2	110-1 note
584	. .	136-44.40
586	. .	18A-26
589	. .	161-22.2
590	1	116-143.2
590	2	116-143.2 note
591	. .	29-19
592	1	51-1
592	2	51-6
593	. .	54-21.2
594	. .	54-20
595	1	108-61.3
595	2	108-61.3 note
596	1	69-1
596	2	69-2 to 69-3.1, 69-5, 69-6
596	3	143A-52
596	4	69-4
597	. .	67-3
598	. .	90-64
599	. .	66-58 note
601	1	57-1
601	2	58-260
601	3	57-1 note, 58-260 note
601	3½	57-1, 58-260
604	1	108-48
604	2	108-110
605	. .	116-143
606	. .	18A-17 L.M.
610	1	78A-17
610	2	78A-46
610	3	78A-48
613	. .	15-11.1
614	1	15-199
614	2	15-197.1
614	3, 4	15A-1021
614	5	143B-266
614	6	148-33.1
614	7	148-33.2
614	8	148-57.1
614	9	15-197.1 note, 15-199 note, 15A-1021 note, 143B-266 note, 148-33.1 note, 148-33.2 note, 148-57.1 note
614	10	15-197.1 note, 15-199 note, 15A-1021 note, 143B-266 note, 148-33.1 note, 148-33.2 note, 148-57.1 note
615	. .	163-278.36
616	. .	14-269
617	1	143-129.1
617	2	143-129.1 note
618	. .	18A-17
619	1, 2	143-129
620	. .	143-128
621	. .	90-202.10
622	. .	143B-399
623	1, 2	148-33.1
624	1-3	148-60.3
625	1	90-21.1
625	2	110-118
626	1	163-31, 163-32, 163-35, 163-46, 163-67, 163-74, 163-80, 163-227, 163-227.2, 163-234, 163-278.22, 163-280, 163-281
627	1	143B-207, 143B-208
627	2	Ch. 134A, Art. 1
627	3, 4	134A-2
627	5	134A-3 to 134A-5, 134A-7 Repealed
627	6	134A-8
627	7	134A-10 to

Ch.	Sec.	1977 General Statutes
627	7	134A-14 Repealed
627	8	134A-18
627	9	134A-20
627	10	134A-22
627	11	134A-26
627	12-15	134A-30 to 134A-33
627	16	134A-39
627	17	7A-286
627	18, 19	7A-289.13
627	20-23	7A-289.14
627	24	7A-289.15
628	. .	106-380
629	. .	106-266.8
630	. .	105-360
631	1	135-33.1
631	2	135-33.1 note
635	1	163-278.8
635	2	163-278.11
637	1	143B-400
637	2	143B-399 note
637	3	143B-401
637	4	143B-400 note
638	. .	20-88
639	. .	136-140.6 to 136-140.9
642	1	15-223
642	2	90-96
642	3	90-113.14
644	. .	143-132
645	1	125-2
646	1-4	115-11.7
646	5	115-11.8
647	1, 2	160A-497
648	. .	90-216.12
649	1	1-311
649	2	1-313
649	3	1-413
649	4	7A-451
649	5	23-30.1
650	. .	25A-36
651	. .	97-29.1
652	. .	90-280
653	. .	95-86
654	. .	108-46
655	1, 2	108-47
656	1, 2	130-9
657	1	105-33, 105-37, 105-37.1, 105-61, 105-64, 105-64.1, 105-67, 105-82
657	2	105-113.44, 105-113.56A
657	3	105-113.86
657	4	105-130.3
657	5	105-135, 105-141, 105-141 note, 105-141.1, 105-144.2, 105-147, 105-161, 105-163.1, 105-163.15
657	6	105-241.1, 105-241.1 note, 105-259
657	7	105-438
658	. .	113-95
659	. .	168-7
660	1	160A-457
660	2	153A-376.1
661	1	163-1
661	2, 3	163-106
661	4	163-181
661	5	163-188
661	6	163-22
661	7	163-213.2
662	. .	115-25
663	. .	55A-15
664	. .	108-61.4
666	1	105-277.1
666	2	105-309
667	1	143B-377 Repealed, 143B-378 Repealed
667	2	143B-210 to 143B-212
667	3	90-88 to 90-94, 90-96, 90-99 to 90-104, 90-106, 90-107, 90-109, 90-109.1, 90-111, 90-113.2, 90-113.3
667	5	143B-210 note
668	1, 2	18A-31
668	3	18A-39
669	1	18A-38, 18A-43
669	2	18A-38
670	1	90-270.2
670	2	90-270.3
670	3	90-270.4
670	4	90-270.5
670	5	90-270.6
670	6	90-270.7
670	7	90-270.11
670	8	90-270.12 Repealed
670	9	90-270.15
671	1, 2	41-2.1
671	3	41-2.1 41-2.1 note
672	1	95-86
672	2	95-88.1
672	3	95-88.1, 95-88.1 note
673	1	1224-A note
673	3	122A-16
673	4	122A-4
673	5	122A-8.1
674	2-6	108-78
674	7	143B-153
675	. .	1A-1 Rule 55
676	1, 2	18A-38
676	3	18A-47
678	2	7A-133, 7A-133 note
679	1-4	143B-147 to 143B-150
679	5, 6	143B-140
679	7	122-1.2, 122-3, 122-4, 122-7.1, 122-7.2, 122-12,

Ch.	Sec.	1977 General Statutes
679	7	122-13, 122-16.1, 122-24.1, 122-35.26, 122-35.36, 122-35.37, 122-35.39, 122-35.41, 122-35.43, 122-35.45, 122-35.49 to 122-35.53, 122-35.57, 122-39, 122-69, 122-70, 122-72, 122-83, 143B-140, 148-19
679	8	122-58.4, 122-58.16, 122-58.19, 122-84.1, 122-85, 143B-140
680	. .	163-227
682	. .	115-73.6 to 115-73.12
683	. .	74-24.6
684	. .	53-117
685	1	148-26.2
685	2	148-26.3
685	3	148-26.2 note, 148-26.3 note
686	1	65-47
686	2, 3	65-48
686	4-6	65-53
686	7	65-54
686	8	65-55
686	9, 10	65-57
686	11, 12	65-58
686	13	65-61
686	14	65-64
686	15	65-60.1
686	16, 17	65-70
687	1	159-40
687	2	159-40 note
691	1	62-2
691	2, 3	62-133
692	1, 2	90-297
692	3	90-294
693	. .	18A-35
694	1, 2	143B-182
694	3-7	143B-183
696	1	122-56.8, 122-56.9
696	2	122-56.8 note, 122-56.9 note
697	. .	120-47.8
698	1, 2	24-14
698	3	24-15
699	1, 2	15-223
700	1, 2	76-14
701	. .	146-60.1
702	1	140-13
702	2	140-14
702	3	143B-89
703	1	143-151.26
703	2	143-151.27
703	3	143-151.28
703	4	143-151.29
703	5	143-151.30
703	6	143-151.31
703	7	143-151.32
703	8	143-151.33
703	9	143-151.34
703	10	143-151.35
703	11	143-151.36
704	1	143B-267
704	2	148-57
704	3	148-53
704	4	148-54
704	5	148-4
705	1-4	113-113.20 to 113-113.23
705	5	113-113.20 note
706	. .	130-169
707	. .	75-16
708	1	159B-3 note, 159B-5.1 note
708	2	159B-3
708	3	159B-5.1
708	4	159B-3 note, 159B-5.1 note
709	1, 2	164-14
710	. .	58-248.33
711	1	15A-1031 to 15A-1035, 15A-1061 to 15A-1065, 15A-1101, 15A-1201, 15A-1211 to 15A-1217, 15A-1221 to 15A-1243, 15A-1301, 15A-1321, 15A-1322, 15A-1331 to 15A-1335, 15A-1341 to 15A-1347, 15A-1351 to 15A-1355, 15A-1361 to 15A-1365, 15A-1371 to 15A-1377, 15A-1401, 15A-1411 to 15A-1422, 15A-1431, 15A-1432, 15A-1441 to 15A-1453
711	3	5A-11 to 5A-17, 5A-21 to 5A-25, 7A-276.1
711	4	7A-27
711	5	7A-31, 15A-305 note
711	6	7A-271
711	7, 8	7A-451
711	9	7A-452
711	10	9-3
711	11	9-15
711	12	9-17
711	13	9-18
711	14	9-21
711	15	14-2
711	16	14-225.2, 14-226
711	16A	15-196.1
711	17	15-196.3
711	18	15-205
711	19	15A-101
711	20	15A-279

Ch.	Sec.	1977 General Statutes
711	21	15A-305
711	22	15A-502
711	23	15A-537
711	24	15A-622
711	25	15A-959
711	26	50-13.3, 50-13.4, 50-16.7
711	27	148-28
711	28	148-29
711	29	148-33.1
711	30	148-53
711	31	162-42
711	32	162-46
711	33	1-180 Repealed, 5-1 note, 5-2 Repealed, 5-3 Repealed, 5-4 note, 5-5 Repealed, 5-6 note, 5-7 Repealed, 5-8 note, 5-9 Repealed, 7A-28 Repealed, 7A-194 Repealed, 14-265 Repealed, 15-103.1 Repealed, 15-110 to 15-124 Repealed, 15-159 Repealed, 15-173.1 Repealed, 15-174 Repealed, 15-179 Repealed, 15-180 Repealed, 15-180.1 Repealed, 15-180.2 Repealed, 15-180.3 Repealed, 15-181 Repealed, 15-182 Repealed, 15-183 Repealed, 15-184 Repealed, 15-185 Repealed, 15-186 Repealed, 15-197 Repealed, 15-197.1 Repealed, 15-198 Repealed, 15-199 Repealed, 15-200 Repealed, 15-200.1 Repealed, 15-200.2 Repealed, 15-205.1 Repealed, 15-217 Repealed, 15-218 to 15-222 Repealed, 122-83 to 122-84.1 Repealed, 122-88 Repealed, 122-89 Repealed, 148-12, 148-30, 148-32 Repealed, 148-42 Repealed, 148-49.1 to 148-49.9 note, 148-58 Repealed, 148-58.1 Repealed, 148-60 Repealed, 148-60.2-148-62 Repealed, 162-41 Repealed, 162-45 Repealed, 162-47 Repealed, 162-49 Repealed
711	34	1-180 note, 5-1 note, 5-2 note, 5-3 note, 5-4 note, 5-5 note, 5-6 note, 5-7 note, 5-8 note, 5-9 note, 5A-11 note, 5A-21 note, 7A-28 note, 7A-194 note, 7A-276.1 note, 14-265 note, 15-110 to 15-124 note, 15-159 note, 15-173.1 note, 15-174 note, 15-179 note, 15-180 note, 15-180.1 note, 15-180.2 note, 15-180.3 note, 15-181 note, 15-182 note, 15-183 note, 15-184 note, 15-185 note, 15-186 note, 15-197 note, 15-197.1 note, 15-198 note, 15-199 note, 15-200 note, 15-200.1 note, 15-205.1 note, 15-217 note, 15-218 note, 15-219 note, 15-220 note, 15-221 note, 15-222 note, 15A-1031 note, 15A-1061 note, 15A-1101 note, 15A-1201 note, 15A-1211 note, 15A-1301 note, 15A-1321 note, 15A-1331 note, 15A-1341 note, 15A-1351 note, 15A-1361 note, 15A-1371 note, 15A-1401 note, 15A-1411 note, 15A-1431 note, 15A-1441 note, 122-83 to 122-84.1 note, 148-30 note, 148-42 note, 148-58 note, 148-58.1 note, 148-60 note, 148-60.2 note, 148-60.3 note, 148-61 note, 148-61.1 note, 148-62 note, 162-41 note, 162-45 note, 162-47 note, 162-49 note
711	35	1-180 note, 5-1 note, 5-2 note, 5-3 note, 5-4 note, 5-5 note, 5-6 note, 5-7 note, 5-8 note, 5-9 note, 7A-28 note, 7A-194 note, 14-265 note, 15-110

Ch.	Sec.	1977 General Statutes
711	35	to 15-124 note, 15-159 note, 15-173.1 note, 15-174 note, 15-179 note, 15-180 note, 15-180.1 note, 15-180.2 note, 15-180.3 note, 15-181 note, 15-182 note, 15-183 note, 15-184 note, 15-185 note, 15-186 note, 15-197 note, 15-197.1 note, 15-198 note, 15-199 note, 15-200 note, 15-200.1 note, 15-205.1 note, 15-217 note, 15-218 note, 15-219 note, 15-220 note, 15-221 note, 15-222 note, 122-83 to 122-84.1 note, 148-30 note, 148-42 note, 148-58 note, 148-58.1 note, 148-60 note, 148-60.2 note, 148-60.3 note, 148-61, 148-61.1 note, 148-62 note, 162-41 note, 162-45 note, 162-47 note, 162-49 note
711	36	1-180 note, 5-1 note, 5-2 note, 5-3 note, 5-4 note, 5-5 note, 5-6 note, 5-7 note, 5-8 note, 5-9 note, Ch. 5A note, 5A-11 note, 5A-21 note, 7A-27 note, 7A-28 note, 7A-31 note, 7A-194 note, 7A-271 note, 7A-276.1 note, 7A-451 note, 7A-452 note, 9-3 note, 9-15 note, 9-17 note, 9-18 note, 9-21 note, 14-2 note, 14-225.2 note, 14-226 note, 14-265 note, 15-110 to 15-124 note, 15-159 note, 15-173.1 note, 15-174 note, 15-179 note, 15-180 note, 15-180.1 note, 15-180.2 note, 15-180.3 note, 15-181 note, 15-182 note, 15-183 note, 15-184 note, 15-185 note, 15-186 note, 15-196.3 note, 15-197 note, 15-197.1 note, 15-198 note, 15-199 note, 15-200 note, 15-200.1 note, 15-205 note, 15-205.1 note, 15-217 note, 15-218 note, 15-219 note, 15-220 note, 15-221 note, 15-222 note, 15A-101 note, 15A-279 note, 15A-305 note, 15A-502 note, 15A-537 note, 15A-622 note, 15A-959 note, 15A-1031 note, 15A-1061 note, 15A-1101 note, 15A-1201 note, 15A-1211 note, 15A-1221 note, 15A-1301 note, 15A-1321 note, 15A-1331 note, 15A-1341 note, 15A-1351 note, 15A-1361 note, 15A-1371 note, 15A-1401 note, 15A-1411 note, 15A-1431 note, 15A-1441 note, 50-13.3 note, 50-13.4 note, 50-16.7 note, 122-83 to 122-84.1 note, 148-12 note, 148-28 note, 148-29 note, 148-30 note, 148-33.1 note, 148-42 note, 148-53 note, 148-58 note, 148-58.1 note, 148-60 note, 148-60.2 note, 148-60.3 note, 148-61 note, 148-61.1 note, 148-62 note, 162-41 note, 162-42 note, 162-45 note, 162-46 note, 162-47 note, 162-49 note
711	38	15A-1371 note
711	39	1-180 note, 5-1 note, 5-2 note, 5-3 note, 5-4 note, 5-5 note, 5-6 note, 5-7 note, 5-8 note, 5-9 note, Ch. 5A note,

Ch.	Sec.	1977 General Statutes
711	39	5A-11 note, 5A-21 note, 7A-27 note, 7A-28 note, 7A-31 note, 7A-194 note, 7A-276.1 note, 7A-271 note, 7A-451 note, 7A-452 note, 9-3 note, 9-15 note, 9-17 note, 9-18 note, 9-21 note, 14-2 note, 14-225.1 note, 14-225.2 note, 14-226 note, 14-265 note, 15-110 to 15-124 note, 15-159 note, 15-173.1 note, 15-174 note, 15-179 note, 15-180 note, 15-180.1 note, 15-180.2 note, 15-180.3 note, 15-181 note, 15-182 note, 15-183 note, 15-184 note, 15-185 note, 15-186 note, 15-196.3 note, 15-197 note, 15-197.1 note, 15-198 note, 15-199 note, 15-200 note, 15-200.1 note, 15-205 note, 15-205.1 note, 15-217 note, 15-218 note, 15-219 note, 15-220 note, 15-221 note, 15-222 note, 15A-101 note, 15A-279 note, 15A-305 note, 15A-502 note, 15A-537 note, 15A-622 note, 15A-959 note, 15A-1031 note, 15A-1061 note, 15A-1101 note, 15A-1201 note, 15A-1211 note, 15A-1221 note, 15A-1301 note, 15A-1321 note, 15A-1331 note, 15A-1341 note, 15A-1351 note, 15A-1361 note, 15A-1371 note, 15A-1401 note, 15A-1411 note, 15A-1431 note, 15A-1441 note, 50-13.3 note, 50-13.4 note, 50-16.7 note, 148-12 note, 148-28 note, 148-29 note, 148-30 note, 148-33.1 note, 148-42 note, 148-53 note, 148-58 note, 148-58.1 note, 148-60 note, 148-60.2 note, 148-60.3 note, 148-61 note, 148-61.1
711	39	note, 148-62 note, 162-41 note, 162-42 note, 162-45 note, 162-46 note, 162-47 note, 162-49 note
712	1	143-34.10
712	2	Ch. 66, Art. 9A note; 71-13 to 71-20 note; Ch. 74, 74-39 Repealed, 74-40 Repealed, 74-42 to 74-75 Repealed, Art. 7 note; 76-1 note, 76-2 note, 76-3 note, 76-4 note, 76-5 note, 76-6 note, 76-7 note, 76-8 note, 76-9 note, 76-10 note, 76-11 note, 76-12 note; Ch. 76, Art. 6 note; Ch. 78A, Art. 5 note; Ch. 81A, Art. 5 note; Ch. 83 note; Ch. 84, Art. 4 note; Ch. 85C note; Ch. 87, Art. 1 note, Art. 2 note, Art. 3 note, Art. 4 note, Art. 5 note, 87-65 to 87-82 Repealed; Ch. 89A note; Ch. 89C note; Ch. 90A, Art. 1 note, Art. 2 note, Art. 3 note; 93C-1 to 93C-18 Repealed; Ch. 93A, note; Ch. 93C note; Ch. 95, Art. 5 note, Art. 15 note; Ch. 113A, Art. 4 note; 125-9 note; 125-10 note; 143-34.11, Ch. 143, Art. 21, Pt. 3 note; Ch. 143B, Art. 2, Part 6 note; Ch. 143B, Art. 7, Pt. 6 note; Ch. 143B, Art. 7, Pt. 8 note; Ch. 143B, Art. 7, Pt. 9 note
712	3	Ch. 66, Art. 9 note, Art. 9B note; Ch. 86 note; Ch. 88 note; Ch. 90, Art. 1 note, Art. 2 note, Art. 4 note, Art. 6 note, Art. 7 note, Art. 8 note, Art. 9 note, Art. 10 note, Art. 11 note, Art. 12A note, Art. 13A note, Art. 16 note, Art. 17 note, Art. 18 note, Art. 18A note, Art. 20 note; Ch. 108, Art. 3, Part 2 note; Ch. 110, Art. 3 note, Art. 7 note; Ch. 113A, Art. 7 note; Ch. 122, Art. 2E note; 122-72 note; Ch. 130, Art. 18 note, Art. 26 note; Ch. 131, Art. 13A note; 143-34.12, Ch. 143, Art. 21, Pt. 1 note, Pt. 2 note, Pt. 4 note, Pt. 5 note, Pt. 6 note, Pt. 6A note, Pt. 7 note, Art. 21A note, Art. 21B note, Art. 38 note; Ch. 143B, Art. 7, Pt. 4 note; 143B-375
712	4	58-15 note, 58-40 note, Ch. 58, Art. 4 note; Ch. 74B note; Ch. 85B

Ch.	Sec.	1977 General Statutes
712	4	note; Ch. 89B note; Ch. 89D note; Ch. 90, Art. 22 note; Ch. 93D note; Ch. 104E note; Ch. 106, Art. 2 note, Art. 4C note, Art. 5A note, Art. 12 note, Art. 14 note, Art. 14A note, Art. 15A note, Art. 17 note, Art. 28A note, Art. 28B note, Art. 29 note, Art. 31 note, Art. 34, Part 10 note, Art. 35 note, Art. 35B note, Art. 44 note, Art. 49 note, Art. 51A note, Art. 53 note, Art. 54 note; Ch. 113, Art. 7 note, Art. 17 note; Ch. 131B Note Ch. 136, Art. 2C note; 143-34.13, Ch. 143, Art. 52, Pt. 3 note; Art. 52, Pt. 4 note
712	5	143-34.14
712	6	143-34.15
712	7	143-34.16
712	8	143-34.17
712	9	143-34.18
712	10	143-34.19
712	11	143-34.20
712	12	143-34.21
712	13	143-34.10 note
712	16	143-34.10 note
713	. .	33-2
714	. .	33-67
715	. .	66-58
718	. .	58-268
719	1	159C-4
719	2, 3	159C-7
719	4	159C-12
719	5	159C-14
719	6	159C-15
719	7	159C-16
719	8	159C-22
719	9	159C-27
720	1-16	20-356 to 20-371
720	17, 18	20-356 note
721	1	7A-6
723	1	14-56.1
723	2	14-56.2
723	3	14-56.1
725	1	35-1.6 to 35-1.20, 35-1.28 to 35-1.39, 35-1.41
725	2	7A-451
725	3	108-106.2 note
725	4	33-1, 33-6, 33-7, 33-12, 33-13, 33-15, 33-18, 33-25, 33-27, 33-47, 33-47.1, 33-48, 33-49.1, 33-54
725	5	35-2 to 35-3.1, 35-6, 35-8 to 35-11, 35-20, 35-21, 35-23, 35-24
725	6	108-19.1
725	7	122-24.1
725	8	7A-451 note, 33-1 note, 33-6 note, 33-7 note, 33-12 note, 33-13 note, 33-15 note, 33-18 note, 33-25 note, 33-27 note, 33-47 note, 33-47.1 note, 33-48 note, 33-49.1 note, 33-54 note, 35-1.6 note, 35-2 note, 35-2.1 note, 35-3 note, 35-3.1 note, 35-6 note, 35-8 note, 35-9 note, 35-10 note, 35-11 note, 35-20 note, 35-21 note, 35-23 note, 35-24 note, 108-19.1 note, 108-106.2 note, 122-24.1 note
726	1	143-422.1 to 143-422.3
726	2	143-422.1 note
727	1	96-1
727	2	96-1.1
727	3	96-1.2
727	4	96-1.3
727	5	96-1.4
727	6	96-1.5
727	7	96-3
727	8-10	96-4
727	11-13	96-5
727	14-36	96-8
727	37-49	96-9
727	50	96-10
727	51	96-11
727	52	96-12
727	53	96-13
727	54	96-15
727	55	96-18
727	56	96-19
727	58	96-8 note, 96-9 note
728	. .	18A-14 L.M.
729	. .	14-162
730	. .	133-1
731	1	20-140.3
731	2	136-89.58
732	1	143B-266 note, 148-49.1 to 148-49.9 Repealed
732	2	148-49.10 to 148-49.16
732	3, 4	148-45
732	5	143B-266
732	6	148-12 note, 148-49.1 to 148-49.9 note
733	. .	143-49
734	1	10-12, 10-13, 31-31.1
734	2, 3	10-12 note, 10-13 note, 31-31.1 note
735	1	14-151.1
735	2	14-159.1 note

Ch.	Sec.	1977 General Statutes
736	1	7A-39.3
736	2	7A-39.6
736	3	7A-52
736	4	7A-53
736	5	7A-4.20
737	1	75A-9.1
737	2	75A-9.1 note
738	1	122-58.21
738	2	122-65.1 Repealed, 122-65.2 Repealed, 122-65.5 Repealed
739	1	122-58.4
739	2	122-58.8
740	. .	28A-22-8
741	1	143B-73.1
741	2	143B-74.1
741	3	143B-73
741	4	143B-74
741	5	143-360 to 143-362 Repealed
741	6	143B-74.2
741	7	143B-74.3
741	8	143-366 recodified as 143B-73.1, 143-367 recodified as 143B-74.1, 143-368 recodified as 143B-74.2, 143-369 recodified as 143B-74.3, 143B-73.1, 143B-74.1 to 143B-74.3
741	9	143B-73.1 note, 143B-74 note, 143B-74.1 note, 143B-74.2 note, 143B-74.3 note
743	. .	97-83
745	. .	148-45
746	1	113-95.2
746	2	113-96.1
746	3	113-95.2 note, 113-96.1 note
747	1, 2	75-1.1
747	3	75-15.2
747	4	75-50 to 75-56
747	5	75-1.1 note, 75-15.2 note, 75-50 note
748	1, 2	58-241.9
748	3	58-241.11
748	4	58-241.32
748	5	58-241.33
748	6	58-241.9
749	. .	20-185
750	. .	129-42.1
751	. .	1-42.4
752	1, 2	163-288.1, 163-288.2
753	. .	1-472
754	. .	113-152
755	1, 2	90-236, 90-237

Ch.	Sec.	1977 General Statutes
755	3, 4	90-240, 90-241
755	5	90-246
755	6	90-249
756	1	122-56.7
757	1, 2	29-21, 29-22
757	3	29-19
759	. .	113-306
760	. .	36-23.2 note
761	. .	14-234
762	1	20-81, 20-81 note
763	. .	114-15.1
764	1	162A-66
764	2	162A-68
766	1	7A-283
766	2	7A-451
766	11	114-26 note
767	1, 2	14-160.1, 14-160.1 note
768	1	39-44 to 39-47
768	2	39-44 note
769	. .	1A-1 Rule 30
770	1	42-38 to 42-44
770	2	42-39
770	3	42-38 note
771	1	143B-276
771	2	143B-277
771	3	143B-279
771	4	7A-343.1, 14-129.1, 14-131 14-137, 14-139, 20-81.3, 20-12.8, 40-2, 47-30, 53A-2, 66-58, 68-43, 69-25.5, 74-40, 74-42, 74-43, 74-49, 74-51, 74-53, 74-61, 75A-5.1, 75A-17, 75A-21, 77-13, 77-14, 87-70, 87-85, 87-91, 87-92, 87-95, 90A-37 to 90A-39, 90A-43, 105-122, 105-147, 105-164.13, 105-275, 113-1, 113-8, 113-14.1, 113-16 to 113-24, 113-26.1, 113-28 to 113-28.4, 113-29 to 113-32, 113-34 to 113-36, 113-40, 113-44.4, 113-44.5, 113-51, 113-52, 113-54, 113-55, 113-55.1, 113-56, 113-58 to 113-60.2, 113-60.4 to 113-60.10, 113-60.14, 113-60.15, 113-61 to 113-66,

Ch.	Sec.	1977 General Statutes
771	4	113-68, 113-70 to 113-77, 113-81.1 to 113-81.3, 113-128, 113-129, 113-132, 113-134.1, 113-136, 113-138, 113-151.1, 113-155, 113-155.1, 113-156 to 113-158, 113-187, 113-203, 113-204, 113-206, 113-207, 113-223, 113-224, 113-226, 113-229, 113-230, 113-251, 113-254, 113-264, 113-315.2, 113-315.5, 113-315.9, 113-315.18, 113-316, 113-317, 113-321, 113-378, 113-379, 113-389, 113A-33, 113A-35.1, 113A-36, 113A-38, 113A-42, 113A-52, 113A-74, 113A-75, 113A-77, 113A-85, 113A-104, 113A-105, 113A-107, 113A-112 to 113A-115, 113A-116, 113A-117, 113A-118, 113A-119, 113A-121, 113A-123, 113A-124, 113A-125 note, 113A-126, 113A-137, 113A-153, 113A-166 to 113A-170, 113A-177, 113A-178, 113A-183, 113A-193, 113A-194, 113B-3, 122A-4, 122A-16, 130-169.02, 130-169.05, 136-21, 136-102.3, 139-5, 139-7, 139-8, 139-13, 139-46, 143-169, 143-177.3, 143-211, 143-213, 143-214.1, 143-215.1, 143-215.3, 143-215.4, 143-215.6, 143-215.8A, 143-215.13, 143-215.15 to 143-215.18, 143-215.21, 143-215.25, 143-215.36, 143-215.40, 143-215.42, 143-215.56, 143-215.62, 143-215.69, 143-215.77, 143-215.84, 143-215.85, 143-215.97, 143-215.100, 143-215.106, 143-215.114, 143-240, 143-243, 143-286.1, 143-289, 143-320, 143-323, 143-345.6, 143-347.11, 143-350, 143-355,
771	4	143-370, 143B-2, 143B-6, 143B-181, 143B-275, 143B-278, 143B-280 to 143B-283, 143B-286, 143B-287, 143B-290, 143B-294, 143B-295, 143B-298, 143B-299 to 143B-303, 143B-305, 143B-306, 143B-308, 143B-309, 143B-311, 143B-312, 143B-314, 143B-315, 143B-317, 143B-318, 143B-320 to 143B-323, 143B-325, 143B-326, 143B-328, 143B-329, 143B-331, 143B-333 to 143B-339, 143B-390, 143B-407, 143B-417, 143B-432 note, 143B-437, 146-8, 146-30, 147-45, 148-26, 156-59, 156-76, 156-83, 159C-7, 160A-9.2, 162A-23 note, 162A-24 note, 162A-25 note, 162A-29
771	5	113-14.3
771	6	143B-340, 143B-341
771	7	113-3
771	8	143-320, 143B-280, 143B-305
771	9	143B-306
771	10	143B-305 note
771	11	108-116 note, 108-118, 108-119
771	11.1	113-28.5 note
771	14	143B-395 Repealed, 143B-396 Repealed
771	15	113A-153, 113A-154
771	16-21	143B-277 note
771	22	14-129.1 note, 14-131 note, 14-137 note, 14-139 note, 20-81.3 note, 40-2 note, 47-30 note, 53A-2 note, 66-58 note, 68-43 note, 69-25.5 note, 74-40 note, 74-42 note, 74-43 note, 74-49 note, 74-51 note,

Ch.	Sec.	1977 General Statutes
771	22	74-53 note,
		74-61 note,
		75A-5.1 note,
		75A-17 note,
		75A-21 note,
		77-13 note,
		77-14 note,
		87-70 note,
		87-85 note,
		87-91 note,
		87-92 note,
		87-95 note,
		90A-37 note,
		90A-38 note,
		90A-39, note,
		90A-43 note,
		100-2 note,
		100-11 note,
		100-12 note,
		100-13 note,
		100-14 note,
		100-15 note,
		102-8 note,
		102-10 note,
		104B-11 note,
		104B-14 note,
		105-122 note,
		105-130.10 note,
		105-147 note,
		105-164.13 note,
		108-116 note,
		108-118 note,
		108-119 note,
		113-1 note,
		113-3 note,
		113-8 note,
		113-14 note,
		113-14.1 note,
		113-14.3 note,
		113-15 note,
		113-15.2 note,
		113-16 note,
		113-17 note,
		113-18 note,
		113-19 note,
		113-20 note,
		113-21 note,
		113-22 note,
		113-23 note,
		113-24 note,
		113-26.1 note,
		113-28 note,
		113-28.1 note,
		113-28.2 note,
		113-28.3 note,
		113-28.4 note,
		113-28.5 note,
		113-29 note,
		113-29.1 note,
		113-30 note,
		113-31 note,
		113-32 note,
771	22	113-34 note,
		113-35 note,
		113-36 note,
		113-40 note,
		113-44.4 note,
		113-44.5 note,
		113-51 note,
		113-52 note,
		113-54 note,
		113-55 note,
		113-55.1 note,
		113-56 note,
		113-58 note,
		113-59 note,
		113-60 note,
		113-60.1 note,
		113-60.2 note,
		113-60.4 note,
		113-60.5 note,
		113-60.6 note,
		113-60.7 note,
		113-60.8 note,
		113-60.9 note,
		113-60.10 note,
		113-60.14 note,
		113-60.15 note,
		113-61 note,
		113-62 note,
		113-63 note,
		113-64 note,
		113-65 note,
		113-66 note,
		113-68 note,
		113-70 note,
		113-71 note,
		113-72 note,
		113-73 note,
		113-74 note,
		113-75 note,
		113-76 note,
		113-77 note,
		113-81.1 note,
		113-81.2 note,
		113-81.3 note,
		113-128 note,
		113-129 note,
		113-132 note,
		113-134.1 note,
		113-136 note,
		113-138 note,
		113-151.1 note,
		113-155.1 note,
		113-156 note,
		113-157 note,
		113-158 note,
		113-187 note,
		113-203 note,
		113-204 note,
		113-206 note,
		113-207 note,
		113-223 note,
		113-224 note,

Ch.	Sec.	1977 General Statutes
771	22	113-226 note,
		113-229 note,
		113-230 note,
		113-251 note,
		113-254 note,
		113-264 note,
		113-315.2 note,
		113-315.5 note,
		113-315.9 note,
		113-315.18 note,
		113-316 note,
		113-317 note,
		113-321 note,
		113-378 note,
		113-379 note,
		113-389 note,
		113-391 note,
		113A-33 note,
		113A-35.1 note,
		113A-36 note,
		113A-38 note,
		113A-42 note,
		113A-52 note,
		113A-74 note,
		113A-75 note,
		113A-77 note,
		113A-85 note,
		113A-104 note,
		113A-105 note,
		113A-107 note,
		113A-112 note,
		113A-113 note,
		113A-114 note,
		113A-116 note,
		113A-117 note,
		113A-118 note,
		113A-119 note,
		113A-121 note,
		113A-123 note,
		113A-124 note,
		113A-126 note,
		113A-137 note,
		113A-153 note,
		113A-166 note,
		113A-167 note,
		113A-168 note,
		113A-169 note,
		113A-170 note,
		113A-177 note,
		113A-178 note,
		113A-183 note,
		113A-193 note,
		113A-194 note,
		113B-3 note,
		130-169.02 note,
		130-169.05 note,
		136-102.3 note,
		139-5 note,
		139-8 note,
		139-13 note,
		139-46 note,
		143-169 note,
771	22	143-177.3 note,
		143-211 note,
		143-213 note,
		143-214.1 note,
		143-215.1 note,
		143-215.3 note,
		143-215.4 note,
		143-215.6 note,
		143-215.8A note,
		143-215.13 note,
		143-215.15 note,
		143-215.16 note,
		143-215.17 note,
		143-215.18 note,
		143-215.21 note,
		143-215.25 note,
		143-215.36 note,
		143-215.40 note,
		143-215.42 note,
		143-215.56 note,
		143-215.62 note,
		143-215.69 note,
		143-215.77 note,
		143-215.84 note,
		143-215.85 note,
		143-215.100 note,
		143-215.106 note,
		143-215.114 note,
		143-240 note,
		143-243 note,
		143-286.1 note,
		143-289 note,
		143-320 note,
		143-323 note,
		143-345.6 note,
		143-347.11 note,
		143-350 note,
		143-355 note,
		143-370 note,
		143B-2 note,
		143B-6 note,
		143B-181 note,
		143B-275 note,
		143B-276 note,
		143B-277 note,
		143B-278 note,
		143B-279 note,
		143B-280 note,
		143B-281 note,
		143B-282 note,
		143B-283 note,
		143B-286 note,
		143B-287 note,
		143B-290 note,
		143B-294 note,
		143B-295 note,
		143B-298 note,
		143B-299 note,
		143B-300 note,
		143B-301 note,
		143B-302 note,
		143B-303 note,

Ch.	Sec.	1977 General Statutes
771	22	143B-305 note,
		143B-306 note,
		143B-307 note,
		143B-308 note,
		143B-309 note,
		143B-311 note,
		143B-312 note,
		143B-314 note,
		143B-315 note,
		143B-317 note,
		143B-318 note,
		143B-320 note,
		143B-321 note,
		143B-322 note,
		143B-323 note,
		143B-325 note,
		143B-326 note,
		143B-328 note,
		143B-329 note,
		143B-331 note,
		143B-332 note,
		143B-333 note,
		143B-334 note,
		143B-335 note,
		143B-336 note,
		143B-337 note,
		143B-338 note,
		143B-339 note,
		143B-390 note,
		143B-395 note,
		143B-417 note,
		143B-437 note,
		146-8 note,
		146-30 note,
		147-45 note,
		148-26 note,
		156-59 note,
		156-76 note,
		156-83 note
		159C-7 note
772	1	14-281.1
772	2	14-281.1 note
773	. .	20-81.7
774	. .	43-5
775	1, 2	160A-536
775	3	160A-538.1
775	4	160A-544
775	5	160A-536 note,
		160A-538.1 note,
		160A-544 note
776	. .	1-182 Repealed
777	1	15A-932
778	1	24-1.1
778	2	24-1.2
778	3	24-1.1
778	4	24-1.2
779	1	24-1.1
779	2	24-1.1B
779	3	24-1.1 note,
		24-1.1B note
779	4	24-1.1 note,
		24-1.1B note
780	. .	136-18
781	1	78B-1 to 78B-11
781	2	78A-56
782	1	55C-4
782	2	105-275
783	1	126-51 to 126-58
783	2	128-24
783	3	135-3
783	4	143-166
783	5	126-51 note,
		128-24 note,
		135-3 note,
		143-166 note
784	1	157-9
784	2	157-15
784	3	157-17
784	4	157-25
784	5	157-26
785	. .	20-42
786	1	110-117
786	2	110-119
786	3	7A-286
786	4	110-123
787	1	15A-701 to 15A-704
787	2, 3	15A-701 note
788	. .	95-69.13
789	1	25A-23
789	2	25A-23 note
790	. .	135-4
791	1, 2	20-218
792	2	105-130.23 note,
		105-130.24 note,
		105-151.2 note,
		105-151.3 note,
		143-139.2 note
792	3	105-151.2
792	4	105-130.23
792	5	105-151.3
792	6	105-130.24
792	7	143-139.2
792	8	143B-450
792	9	143-151.42
792	10	105-130.23 note,
		105-130.24 note,
		105-151.2 note,
		105-151.3 note,
		143-139.2 note,
		143-151.2 note,
		143B-447
792	11	105-130.23 note,
		105-130.24 note,
		105-151.2 note,
		105-151.3 note,
		143-139.2 note,
		143-151.2 note,
		143B-447 note,
		143B-450 note
793	1	44A-4
793	2	44A-4 note
794	1	113-87
794	2	113-109
794	3	113-87 note,

Ch.	Sec.	1977 General Statutes
794	3	113-102 note, 113-109 note
794	4	113-102
794	5	113-87 note, 113-102 note, 113-109 note
795	1	31-11.6
795	2	31-18.1
795	3	31-11.6 note, 31-18.1 note
795	4	31-11.6 note
796	. .	127A-45.3 to 127A-45.5
797	. .	143-166.1
798	. .	28A-14-3
799	. .	62-138
800	. .	69-25.5 L.M.
802	8	20-289
802	9	20-324
802	15	138-8
802	15.20	143-34.3 Repealed
802	15.25	143-34.2
802	25.36	148-26
802	39.5	115.29
802	40.5	126-7
802	41.1	7A-44
802	41.2	7A-465
802	41.3	7A-172
802	42	7A-101
802	42.6	147-33
802	42.7	147-35
802	42.8	147-55
802	42.9	147-65
802	42.10	106-11
802	42.11	95-2
802	42.12	58-6
802	42.14	114-7
802	42.15	115-13
802	42.20	143B-9
802	47	121-12.1, 121-12.2
802	50	58-63
802	50.10	105-446.4 Repealed, 105-446.4 note
802	50.30	147-48
802	50.31	147-54.1
802	50.45	143B-454
802	50.57	143-64.24
802	50.60	120-32
802	50.65 to 50.70	135-5
802	53	7A-44 note, 7A-101 note, 7A-172 note, 7A-465 note, 20-289 note, 20-324 note, 58-63 note, 95-2 note, 106-11 note, 114-7 note, 115-13 note, 115-29 note, 120-32 note, 121-12.1 note, 121-12.2 note, 135-5 note, 138-8 note, 143-34.2 note, 143-64.24 note, 143B-9 note, 143B-454 note, 147-33 note, 147-35 note, 147-48 note, 147-54.1 note, 147-55 note, 147-65 note
802	54	121-12.1 121-12.2, 138-8 note
803	. .	115-126
804	1, 2	93-12
804	3	93-12 note
806	. .	95-134
807	. .	14-391
808	. .	136-41.3
809	1, 2	14-254
810	. .	14-288.8
811	. .	159-48
812	. .	20-16.2
813	1	13-1
813	2	13-2
814	1	32-50 to 32-52
814	2	28A-23-3
814	3	28A-23-4
814	4	28A-11-5
814	5	28A-12-8
814	6	47-115.1
814	7	33-43
814	8	32-4 Repealed
814	9	25-8-403
814	10	28A-11-5 note, 28A-12-8 note, 32-50 note
815	. .	90-320 to 90-322
815	2	90-320 note
817	1	50-6
817	2	50-6 note
818	. .	143B-394
819	1, 2	19-1
819	3	19-1.1 to 19.1-5
819	4	19-2 Repealed, 19-2.1 to 19-2.5
819	5	19-3
819	6	19-5
819	7	19-6
819	8	19-8
819	9	19-8.1 19-8.2
819	10	19-8.3
819	11	19-1.1 note, 19-1.2 note, 19-1.3 note,

Ch.	Sec.	1977 General Statutes
819	11	19-1.4 note, 19-1.5 note, 19-2.1 note, 19-2.2 note, 19-2.3 note, 19-2.4 note, 19-2.5 note, 19-8.1 note, 19-8.2 note, 19-8.3 note
820	1	153A-334
820	2	160A-375
822	1	143B-402, 143B-403
822	3	143B-402 note
823	1-4	115A-7
823	5	115A-8
824	1-3	148-26
826	1	95-161
826	2	95-163
828	1	58-125 to 58-131.9 Repealed, 58-131.10 to 58-131.25 Repealed, 58-131.26 to 58-131.33 Repealed, 58-246 to 58-248.8 Repealed, 58-248.10 Repealed
828	2	58-131.34 to 58-131.60
828	3	58-176
828	4, 5	58-27.2
828	6	58-124.17 to 58-124.28
828	7	97-100
828	8	97-102 to 97-104.6 Repealed
828	9	58-30.4
828	10	58-248.26
828	11	58-248.32
828	12	58-248.29
828	13	58-248.30
828	14-19	58-248.33
828	20	58-248.34
828	21	58-248.34, 114-2 note
828	22	58-248.35
828	23	58-248.37
828	24	58-27.2 note, 58-30.4 note, 58-124.17 note, 58-131.34 note, 58-176 note, 58-248.26 note, 58-248.29 note, 58-248.30 note, 58-248.32 note, 58-248.33 note, 58-248.34 note, 58-248.35 note, 58-248.37 note, 97-100 note, 97-102 to 97-104.6 note
828	25	58-27.2 note, 58-30.4 note, 58-124.17 note, 58-125 to 58-131.9 note, 58-131.10 to 58-131.25 note, 58-131.26 to 58-131.33 note, 58-131.34 note, 58-176 note, 58-248.26 note, 58-248.29 note, 58-248.30 note, 58-248.32 note, 58-248.33 note, 58-248.34 note, 58-248.35 note, 58-248.37 note, 97-100 note, 97-102 to 97-104.6 note
829	. .	14-34.2
830	1	115-11.2
830	2, 3	115-183
831	1	17B-1
831	2	17B-3.1
832	1	15A-274
832	2	15A-277
833	1	46-28.1
833	2	46-33
833	3	46-28.2
833	4	46-28.1 note, 46-28.2 note, 46-33 note
834	1	160A-167
834	2	160A-209
834	3	153A-149
835	. .	58-210
836	. .	114-10.1
837	. .	14-306
838	1	90-9
838	2	90-13
838	3	90-14 Repealed
838	4	90-15
838	5	90-16
839	2	20-167.1 note
840	. .	20-9
841	1	84-5.1
841	2	84-17, 84-23, 84-24, 84-34
842	1	143B-163, 143B-164
843	1	90-21.21
843	2	90-21.20
844	. .	7A-227
845	1	74-49
845	2	74-51
848	1	166-1 to 166-12 Repealed
848	2	166A-1 to 166A-16
849	1	71-1 to 71-20 Repealed, 143B-404 to 143B-411
849	2	143B-404 note
850	. .	66-58 L.M.
851	1	8-58.6
851	2	8-58.6 note
852	. .	113A-64
853	1, 2	14-56.3
853	3	14-56.3 note
854	1	18A-42.1

Ch.	Sec.	1977 General Statutes
854	2	18A-21
855	1	55B-2, 55B-4, 55B-6
855	2	55B-2 note, 55B-6 note
856	. .	163-278.18
857	1	130-160
857	2	130-17
858	1	143-215.85
858	2	143-215.88
858	3	143-215.94
859	. .	1-539.1
860	. .	15A-1002
861	1	15-144.1
861	2	15-144.1 note
862	1, 2	90-95
863	. .	105-322
864	. .	105-312
865	1, 3	20-7
866	1	126-4
866	2-5	126-5
866	6	126-7
866	7, 8	126-16, 126-17
866	9	126-22
866	10, 11	126-24, 126-25
866	12	126-29
866	13	126-36
866	14, 15	126-38, 126-39
866	16	126-36, 126-36.1
866	17	126-4
866	18	126-45
866	19	126-5 note
866	20	126-4
866	21	126-17 note, 126-29 note, 126-36.1 note, 126-38 note, 126-39 note
867	. .	105-278.3
868	. .	58-40.2
869	1	105-277, Repealed
869	2	105-278
869	3	160A-399.4
869	4-6	160A-399.5
869	7	105-278 note
870	1	28A-8-1.1
870	2	28A-8-1.1 note
871	1	14-87
871	2	14-52
871	3	14-87 note
871	4	14-52 note, 14-87 note
871	5	14-52 note, 14-87 note
871	6	14-87
871	7	14-52 note, 14-87 note
872	1	143B-184 note, 143B-185 note
872	2	143B-184 transferred to 143B-412, 143B-185 transferred to 143B-413, 143B-412, 143B-413
872	3	143-283.7 note
872	4	143-283.7
872	6	143B-186 transferred to 143B-414, 143B-414, 143B-187 transferred to 143B-415, 143B-415, 143B-416
872	7	110-65 Repealed, 110-66 Repealed, 110-71 Repealed
872	9	143B-416 note
873	1	7A-273
873	2	7A-273 note
874	. .	105-113.9
875	. .	116-7
876	1, 2	130-9.4
876	3	130-9.3 note
877	1, 2	108-75.3
877	3, 4	108-75.4
877	5	108-75.5
877	6-9	108-75.6
877	10-13	108-75.7
877	14, 15	108-75.8
877	16-18	108-75.9 to 108-75.11
877	19	108-75.13
877	20	108-75.14 Repealed
877	21	108-75.18
877	22-24	108-75.19
877	25	108-75.20
877	26, 27	108-75.22
877	28	108-75.24
877	29	108-75.25
878	1	143-215.24
878	2	143-215.25
878	3	143-215.32
878	4	143-215.25
878	5	143-215.29
878	6	143-215.33
879	1	48-2
879	2	48-5
879	3	48-6
879	4	48-6.1 Repealed
879	5	48-9
879	6	48-13
879	7	7A-288 Repealed
879	8	7A-289.22 to 7A-289.34
879	9	7A-288 note, 7A-289.22 note, 48-2 note, 48-5 note, 48-6 note, 48-9 note, 48-13 note
880	1	20-97
880	2	20-97 note
881	1, 2	143B-178
881	3	143B-179

Ch.	Sec.	1977 General Statutes
882	. .	160A-360
883	. .	44A-13
884	1	66-94 to 66-100
884	2	66-94 note
885	. .	14-107
886	1	1-52
886	2	105-377
886	3	1-54
886	4	1-52 note, 1-54 note, 105-377 note
887	1	14-399
887	2	14-134.1 Repealed
887	3	20-188
888	1	15-197.1 note
889	6	20-185
890	1, 2	105-147
891	1	90-89
891	2	90-90
891	3	90-92
891	4	90-101
891	5	90-113.2
892	1	97-31
892	3	97-31 note
893	1	97-2
893	2	97-2 note
894	1, 2	168-10
895	1, 2	105-164.14
896	. .	94-2
897	1	130-264 to 130-276
897	2	130-9 note, 130-9.5, 130-9.5 note
897	3	130-277, 130-9.5 note
897	4	130-264 note, 130-9.5 note
898	. .	105-149
899	1	88-12
899	2	88-12 note
900	1	105-147
900	2, 3	105-3
900	4	105-141, 105-141 note
900	5	105-135
900	6	105-141, 105-141 note
901	. .	7A-284
902	1	20-16
902	2	20-141.1
902	3	20-141.1 note
903	. .	105-164.4
904	1	90-18.1
904	2, 3	90-158
904	4	90-167
904	6	90-18.1 note, 90-158 note, 90-167 note
905	1	113-105.3
905	1.5	113-105.2
905	2	113-105.3
905	3	113-105.3 note
906	1	143-240
906	2	143-241
906	3	143-242
906	4	143-243
906	5	143-245 Repealed
906	6	143-241 note
907	1	90-113.4A
907	2	90-113.4A note
908	. .	18A-20
909	. .	135-8
910	1-3	1A-1 Rule 4
911	. .	18A-38
912	2	160A-360
912	4	160A-360
912	5	160A-364
912	6	160A-376
912	7	160A-385
912	8	160A-387
912	9-12	160A-388
912	13	160A-429
912	14	160A-445
913	2	62-10, 62-13
914	1	42-50 to 42-55
914	2	42-56
914	3	42-50 note
915	1	120-30.24 to 120-30.35
915	2	150A-12
915	3	120-30.17
915	4	120-30.11
915	5	150A-2
915	6	120-30.25
915	7	150A-58
915	9	120-30.11 note, 120-30.17 note, 120-30.24 note, 150A-2 note, 150A-12 note, 150A-58 note
915	10	120-30.11 note, 120-30.17 note, 120-30.24 note, 150A-2 note, 150A-12 note, 150A-58 note
916	1	75B-1 to 75B-7
916	2	1-52
916	3	Ch. 75B note, 75B-1 note
917	. .	24-11
918	. .	105-2
919	. .	14-72.2
920	. .	62-268
921	4	25A-25
922	1	90-149
922	2, 3	90-155
923	1	143B-371
923	2	143B-137
924	. .	157-3
925	1	148-30
925	2	148-32.1
926	1, 2	118-25, 118-26
926	3	118-31
927	1	115-363 to 115-367, 115-373 to 115-377, 115-383, 115-384, 115-390, 115-396, 115-402, 115-408 to 115-410

Ch.	Sec.	1977 General Statutes
927	2	115-1.1, 115-1.2 Repealed, 115-315.1 to 115-315.6 Repealed
927	4	115-363 note, 115-373 note, 115-383 note, 115-390 note, 115-396 note, 115-402 note, 115-408 note
928	. .	138-6
929	1	110-93, 110-95 to 110-97 Repealed
929	2	110-94
929	3	110-104
930	. .	143-32
931	1-7	114-26 to 114-32
931	8	114-33, 114-36
931	9	114-34
931	10	114-35, 114-37
931	11	114-26 note, 114-27 note, 114-28 note, 114-29 note, 114-30 note, 114-31 note, 114-32 note, 114-33 note, 114-34 note, 114-35 note
931	12	114-33 note, 114-34 note, 114-35 note
932	1	143-345.6
932	3	143-345.6 note
933	1-9	113-113.6 to 113-113.14
933	10	113-113.6 note
935	1	143-300.1
936	. .	135-56
945	1	7A-146
945	2	7A-170
945	3, 4	7A-171
945	5	7A-171.1, 7A-171.2, 7A-172 Repealed
945	6	7A-171.1, 7A-171.2
945	8	7A-171.1 note, 7A-171.2 note, 7A-172 note
946	1	105-267
946	2	105-381
946	3	105-382, Repealed
946	4	1-52
946	5	1-52 note, 105-267 note, 105-381 note, 105-382 note
947	1	7A-133
949	1, 2	134A-28, 134A-28 note
950	1	148-10.1
950	4	148.10.1 note
965	1	105-277
965	2	105-277 note
967	. .	143B-417 to 143B-419
969	1	7A-69
973	. .	128-26
977	1, 2	18A-39
978	1	14-71.1
978	2, 3	14-72
978	4	14-71.1 note
981	1-6	115B-1 to 115B-6, 115B-1 note, 115B-2 note, 115B-3 note, 115B-4 note, 115B-5 note, 115B-6 note
983	. .	95-105
984	. .	1A-1 Rule 32
987	1	14-202.10 to 14-202.12
987	2	14-202.10 note
988	1, 2	120-74, 120-75
988	3	120-78
988	4	120-74 note
991	1	143B-213 to 143B-216.5, 143B-394.1 to 143B-394.3
991	3	143B-213 note
992	1	33-13.2
992	2	33-13.2 note
996	1	143-204.8
996	2	147-58
996	3	143-204 Repealed
996	5	143-204.8 note
997	3	143B-394.1 note
998	1	146-23.1
999	1, 2	113-152
1000	. .	105-278.9
1001	1, 2	105-275
1002	. .	20-88.1
1003	. .	62-300
1004	. .	105-4
1007	. .	135-5.2
1008	1-5	143B-121 to 143B-125
1008	7	143B-121 note
1011	1	110-104
1011	2	110-90.1
1011	3	110-102
1011	4	110-91
1011	5	110-90.1 note
1012	. .	146-30
1016	1	14-269.3
1016	2	14-269.3 note
1021	1	136-71.7, 136-71.8, 136-71.13
1021	2	136-71.13 note
1025	. .	105-3
1029	1	147-58
1029	2	116-43.1 note
1032	. .	143B-420, 143B-421
1037	. .	115-205.11
1038	1	106-190.1
1038	2	106-190.1 note
1047	. .	7A-16
1048	. .	143-166.2
1050	. .	143B-163, 143B-164
1064	1	143B-481, 143B-482, 143B-483, 143B-484, 143B-485
1064	2	143B-481 note
1064	4	143B-481 note
1065	. .	115A-5
1070	. .	135-5.1
1083	1, 2	122A-2, 122A-3
1083	3	122A-5.3
1083	4	122A-6
1083	5	122A-6.1
1083	6	122A-3 note

Ch.	Sec.	1977 General Statutes
1083	7	122A-5.3 note, 122A-6.1 note
1088	2, 3	115-206.25
1088	4	115-59, 115-206.24 Repealed
1088	5	115-206.25 note
1089	1	108-54
1089	2	108-54.1
1089	3	108-54 note, 108-54.1 note, 108-55 note, 108-56 note, 108-57 note
1090	. .	143-166
1099	1	102-15 to 102-17
1099	2	102-15 note, 102-16 note, 102-17 note
1101	. .	105-149
1102	. .	20-218
1103	. .	160A-18
1104	. .	110-91
1105	1, 2	14-415.1
1106	. .	14-89.1
1107	. .	45-40
1108	. .	24-11
1109	1	90-143
1109	2	90-153
1109	3	90-157.1, 90-157.2
1110	1	130-66
1110	2	130-48
1110	3	130-49
1110	4	130-60
1111	1, 2	54-33.3
1112	1	157-66
1112	2	157-67
1112	3	157-68
1112	4	157-69
1112	5	157-70
1113	. .	115-206.3
1114	1	105-241.1
1114	2	105-263
1114	3	105-16
1114	4	105-113.35
1114	5	105-113.86
1114	6	105-129
1114	7	105-130.19
1114	8	105-163.15
1114	9	105-163.30
1114	10	105-164.19
1114	11	105-241.1
1114	12	105-241.1 note
1115	. .	85B-2
1116	1	8-40.1
1116	2	8-40.1 note
1117	. .	15A-143
1118	. .	8-53
1119	1	7A-41
1119	2	7A-41 note
1119	3, 4	7A-41
1120	1	135-56.1
1120	2	135-58
1120	4	135-56.1 note
1121	1	7A-286
1121	2	7A-286 note
1122	1-9	106-26.13 to 106-26.21
1122	10	106-26.7 to 106-26.12 Repealed
1123	1	20-171.1, 20-171.2
1123	2	20-171.1 note
1124	. .	147-86.1
1125	. .	143-453
1126	1	122-58.7
1127	. .	108-24
1128	1	115-36
1129	1	163-35
1130	1	7A-41
1130	2	7A-41, 7A-41 note
1130	3	7A-60
1130	4, 5	7A-133
1130	6	7A-465
1130	7	7A-466
1131	1	14-2.1
1131	2	14-2.1 note

SESSION LAWS 1977, 2ND SESSION

Ch.	Sec.	General Statutes
1132	4, 5	161-10
1134	1	14-443 to 14-447
1134	2	122-65.10 to 122-65.12
1134	3	122-65.13
1134	4	122-58.22, 122-58.23
1134	5	15A-534
1134	6	14-334 to 14-335.1 Repealed, 122-65.6 to 122-65.9 Repealed
1134	8	14-443 note, 122-65.10 note, 122-65.13 note
1135	8	58-248.33
1136	12	7A-172 note
1136	13	7A-101
1136	18.1	135-33
1136	30	116-36.1
1136	31	116-36.2
1136	32	116-36.3
1136	36	147-58
1136	38.1	138-6
1136	39	147-11
1136	40	147-33
1136	45	7A-101 note, 7A-172 note, 116-36.1 note. 135-33 note, 138-6 note, 147-11 note,

Ch.	Sec.	1977, 2nd Sess. General Statutes
1136	45	147-33 note, 147-58 note
1138	1	18A-2
1138	2	18A-8
1138	3, 4	18A-15
1138	5	18A-25
1138	6	18A-29
1138	7	18A-29.1
1138	8-12	18A-30
1138	13, 13.1	18A-31
1138	14	18A-40
1138	15	18A-51
1138	16	18A-54
1138	17	18A-2 note, 18A-8 note, 18A-13 note, 18A-15 note, 18A-25 note, 18A-29 note, 18A-29.1 note, 18A-30 note, 18A-31 note, 18A-40 note, 18A-51 note, 18A-54 note
1138	18	18A-15, 18A-29, 18A-29.1, 18A-30
1138	19	18A-13 Repealed
1139	19	160A-511
1144	19	44-51.8
1145	19	130-199
1146	19	62-140
1147	1	15A-1021
1147	2	15A-1221
1147	3	15A-1236
1147	4	15A-1301
1147	4A, 5	15A-1341
1147	6, 7	15A-1342
1147	8-10	15A-1343
1147	11, 11A	15A-1344
1147	11B	90-96, 90-96 note
1147	12, 13	15A-1345
1147	13A	15A-1344
1147	14	15A-1347
1147	15-17	15A-1351
1147	18	15A-1352
1147	19	15A-1355
1147	19A-22	15A-1371
1147	23-26	15A-1376
1147	27	15A-1377 Repealed
1147	28	15A-1446
1147	29	15A-1448
1147	30	15-196.1
1147	31	15A-1371 note
1147	32	1-180 note, 5-1 to 5-9 note, Ch. 5A note, 7A-27 note, 7A-28 note, 7A-31 note, 7A-194 note, 7A-271 note, 7A-276.1 note, 7A-451 note, 7A-452 note, 9-3 note, 9-15 note, 9-17 note, 9-18 note, 9-21 note, 14-2 note, 14-225.2 note, 14-226 note, 14-265 note, 15-110 to 15-124 note, 15-159 note, 15-173.1 note, 15-174 note, 15-179 to 15-186 note, 15-196.1 note, 15-196.3 note, 15-197 to 15-200.1 note, 15-205 note, 15-205.1, note, 15-217 note, 15-218 to 15-222 note, 15A-101 note, 15A-279 note, 15A-305 note, 15A-502 note, 15A-537 note, 15A-622 note, 15A-959 note, 15A-1031 note, 15A-1061 note, 15A-1101 note, 15A-1201 note, 15A-1211 note, 15A-1221 note, 15A-1301 note, 15A-1321 note, 15A-1331 note, 15A-1341 note, 15A-1351 note, 15A-1361 note, 15A-1371 note, 15A-1401 note, 15A-1411 note, 15A-1431 note, 15A-1441 note, 50-13.3 note, 50-13.4 note, 50-16.7 note, 122-83 to 122-84.1 note, 148-12 note, 148-28 to 148-30 note, 148-33.1 note, 148-42 note, 148-53 note, 148-58 note,

Ch.	Sec.	1977, 2nd Sess. General Statutes
1147	32	148-58.1 note, 148-60 note, 148-60.2 to 148-62 note, 162-41 note, 162-42 note, 162-45 to 162-47 note, 162-49 note
1147	33	148-33.2
1147	34	148-37
1147	35	148-49.16
1147	36	148-57.1
1151	. .	131-7 L.M.
1152	. .	14-234 L.M.
1155	. .	18A-16 L.M.
1157	. .	44-51.8
1166	. .	63-4 L.M.
1168	. .	153A-265 L.M.
1169	. .	14-289 L.M.
1171	. .	18A-16 L.M.
1172	. .	152-1 L.M.
1176	. .	1-110 L.M.
1178	. .	20-118
1179	1-8	15A-701
1179	9, 10	15A-701 note
1181	1	53-117
1181	2	53-99
1181	4	53-99 note, 53-117 note
1182	1	131-175 note
1182	2	131-175 to 131-188
1182	3, 4	131-175 note
1183	3, 4	113-161
1184	3, 4	130-170.2
1184	3	130-170.2 note
1185	1	14-118.5
1185	2	14-155
1185	3	14-118.5 note
1186	1	110-128
1186	2, 3	110-129
1186	4	110-130
1186	5, 6	110-132
1186	7	110-133
1186	8	110-134
1186	9, 10	110-135
1186	11, 12	110-136
1186	13	110-137
1186	14	110-138
1186	15	110-139
1186	16	110-141
1187	1	105-316.1, 105-316.5, 105-316.6
1187	2	105-316.1
1187	3	105-316.4
1187	4, 5	105-316.6
1189	4, 5	143B-404 to 143B-411
1190	1	50-6
1190	2	50-6 note
1191	1	143-318.1
1191	2	143-318.2
1191	3	143-318.3
1191	4	143-318.4
1191	5	143-318.8
1191	6	153A-40
1191	7	160A-71
1191	9	143-318.8 note
1192	1	130-9 note, 130-9.5, 130-9.5 note
1192	2	130-9.5 note, 130-264 note
1193	2	71A-1 to 71A-6
1194	1	90-18.1
1194	2	90-18.2
1194	3	90-18.2 note
1195	1	159-40
1195	2	159-40 note
1196	2	160A-457 L.M.
1197	2	159C-3
1198	1	159D-1 to 159D-27
1198	2	159D-1 note
1199	2	90-21.21
1200	1	105-130.5
1200	2	105-141
1200	3	105-163.01 to 105-163.04
1200	4	105-275
1200	5	105-289.1
1200	6	105-163.01 note, 105-289.1 note
1204	1	143A-38.1
1204	2	143A-28 Repealed
1204	3	143-166
1204	4	143A-38.1 note
1205	1	130-166.21 E
1205	2	130-166.21 F
1206	2	139-53 to 139-57
1207	2	126-24
1211	2	113-104
1213	2	126-7
1214	1	131B-1 to 131B-9
1214	2	Ch. 131B note, 143-34.12
1214	3	131B-1 note
1215	3	105-446.3
1216	3	130-166.16 to 130-166.21D
1217	1	19A-20
1217	2	19A-21
1217	3	19A-22
1217	4	19A-23
1217	5	19A-24
1217	6	19A-25
1217	7	19A-26
1217	8	19A-27
1217	9	19A-28

Ch.	Sec.	1977, 2nd Sess. General Statutes
1217	10	19A-29
1217	11	19A-30
1217	12	19A-31
1217	13	19A-32
1217	14	19A-33
1217	15	19A-34
1217	16	19A-35
1217	17	19A-36
1217	18	19A-37
1217	19	19A-38
1217	20	19A-20 note
1217	21	19A-39
1218	21	105-164.4
1219	5	108-60 note
1219	6	108-7
1219	7	108-15
1219	8	108-19
1219	9	108-23
1219	10	108-24
1219	11	108-27
1219	12	108-42
1219	13	108-43
1219	14-18	108-44
1219	19	108-45
1219	20	108-50
1219	21	108-54
1219	22	108-54.1
1219	23	108-56
1219	24	108-59
1219	25	108-60
1219	26, 27	143B-153
1219	28	143B-153 note
1219	31	7A-343.1
1219	32	62-300
1219	33	55-15
1219	34	55-146
1219	35	55A-13
1219	36	159-64
1219	39	113-28.5
1219	39.1	113-28.7
1219	39.2	113-28.8
1219	42	115-315.32 to 115-315.34
1219	43.1	7A-41 note
1219	43.2	7A-133 note
1219	43.3	7A-465
1219	43.6	105-164.13
1219	43.7	85B-6
1219	44	143A-17
1219	45	143-16.1
1219	46	143B-10
1219	48	143-342.1
1219	57	7A-41 note, 7A-133 note, 7A-343.1 note, 7A-465 note, 55-15 note, 55-146 note, 55A-13 note, 62-300 note, 85B-6 note, 105-164.13 note,
1219	57	108-7 note, 108-15 note, 108-10 note, 108-23 note, 108-24 note, 108-27 note, 108-42 to 108-45 note, 108-50 note, 108-54 note, 108-54.1 note, 108-56 note, 108-59 note, 108-60 note, 113-28.5 note, 113-28.7 note, 113-28.8 note, 115-315.32 note, 143-16.1 note, 143-342.1 note, 143A-17 note, 143B-10 note, 143B-153 note, 159-64 note
1219	59	115-315.32 note, 143-16.1 note, 143-342.1 note
1220	59	105-199
1221	59	105-141
1222	1	20-179
1222	59	20-179 note
1223	59	50-3
1237	1, 2	138-6
1237	3	138-6 note
1238	1	78-41
1238	2	7A-60
1238	3	7A-133
1238	4	7A-133 note
1238	5	7A-60 note
1240	5	128-27
1243	3	7A-133
1243	4	7A-41
1243	6	7A-133
1249	1, 2	120-3
1249	3, 4	120-3.1
1249	5	147-11
1252	1	108-62
1252	2	108-65
1256	1	115-204.1
1257	1	130-283 to 130-285
1257	3	130-283 note
1278	3	120-37
1280	1	115-183.1
1280	2	115-183
1280	3	115-53
1280	4	20-217
1293	1	135-86
1293	2	135-86 note
1293	4	135-86 note
1296	4	113-109
1297	4	105-283

Ch.	Sec.	1977, 2nd Sess. General Statutes
1298	1	105-159.1
1298	2	163-278.41 to 163-278.45
1298	3	105-159.1 note, 163-278.41 note

SESSION LAWS 1979

Ch.	Sec.	General Statutes
1	. .	20-130.2
2	. .	143B-267
3	. .	129-40
4	. .	102-1.1
6	. .	113A-87
7	. .	14-37 Repealed
8	. .	8-40.1
9	1, 2	110-91
11	. .	105-449.49
12	. .	105-472
13	1	105-449.2
13	2	105-449.10
14	. .	143-333 to 143-333.5 Repealed
15	. .	14-130
16	1	105-52 Repealed
16	2	105-51
17	1	105-164.4
17	2	105-164.6
18	1	105-113.86
18	2	105-113.95
19	1	18A-35
19	2	18A-35
19	3, 4	18A-27
21	. .	20-116
22	. .	105-164.4
23	1	163-122
23	2	163-296
23	3	163-122
23	4, 5	163-296
24	. .	163-106
26	. .	118-1 L.M.
29	. .	152-1 L.M.
30	1	143B-336
30	2	143B-336 note
31	1, 2	20-218
33	1	53-166
33	2	53-173
33	3	53-180
34	. .	138-6
35	1	143-496
35	2	143-502
36	. .	20-16
37	. .	20-7, 20-7 note
38	. .	65-7
39	. .	20-4.01, 20-4.01 note
40	. .	20-65, 20-65 note
41	. .	143B-142
42	. .	143B-312
43	. .	146-25.1
44	. .	113A-153
45	1	105-302.1
45	2	105-302.1 note
46	1, 2	105-164.13
47	. .	105-164.14 note
47	. .	105-164.14
48	1	105-164.4
48	2	105-164.3
48	3, 4	105-164.6
49	1, 2	105-58
50	. .	106A-388
51	. .	105-16
54	1	131A-3
54	2-6	131A-4
54	7	131A-5
54	8	131A-6
54	9	131A-8
54	10	131A-11
54	11	131A-12
54	12	131A-13
54	13	131A-14
54	14	131A-3 note, 131A-4 note, 131A-5 note, 131A-6 note, 131A-8 note, 131A-11 note, 131A-12 note, 131A-13 note, 131A-14 note
54	15, 16	131A-3 note, 131A-4 note, 131A-5 note, 131A-6 note, 131A-8 note, 131A-11 note, 131A-12 note, 131A-13 note, 131A-14 note
55	1	143-215.27
55	2	143-215.33
56	. .	130-87 to 130-93.01
57	1	105-113.56C
57	2	105-113.56A
57	3	105-113.56C note
58	1, 2	105-113.60
59	1	105-113.43
59	2	105-113.44
59	3	105-113.51
60	1	163-150
60	2	163-150 note
61	. .	15-223.1
62	. .	105-76 Repealed
63	. .	105-34 Repealed
64	. .	105-100 Repealed
65	. .	105-63 Repealed
66	. .	105-78 Repealed
67	. .	105-48 Repealed
68	. .	105-93 Repealed
69	. .	105-47 Repealed

Ch.	Sec.	1979 General Statutes
70	. .	105-71 Repealed
71	. .	105-164.3
72	. .	105-35 Repealed
73	1	43-8
73	2	43-12
74	. .	105-53
74	. .	105-4
76	. .	20-183.9
77	. .	20-183.2
84	. .	103-4
85	1	105-101 Repealed
85	2	147-37
85	3	147-38 Repealed
86	. .	97-2
88	1	41-6.2
88	2	28A-1-2 Repealed
91	. .	55-57
92	1	113-120.5
92	2	113-120.6
93	. .	20-49
94	. .	118-1 L.M.
95	1	130-43
95	2, 3	130-46
95	4	130-50
95	5	130-51
95	6	130-52
95	7	130-54
95	8	130-56
95	9	130-63
96	1	54A-27 note
96	2	54A-26 Repealed
97	. .	59-1
98	. .	130-161.1, 130-165
99	. .	20-46 Repealed
100	1	35-10.1
100	2	35-10.1 note
101	. .	20-11
102	. .	159B-9
103	1, 2	105-242
103	3, 4	105-368
104	. .	20-4.20
105	. .	90-21.21 note
106	. .	20-67
107	1	15A-711
107	2, 3	29-16
107	4	31-18.1
107	5	31A-14
107	6	48-4
107	7	48-5
107	8	90-8
107	9	114-2
107	10	143B-183
107	11	143B-479
107	12	160A-234
107	13	160A-399.8
107	14	163-227.2
107	15	163-278.12
108	1	90-139
108	2	90-140
108	3	90-140 note
109	1	159C-3, 159C-5 to 159C-8,
109	1	159C-11, 159C-12, 159C-28
109	2	159C-1 note
110	1	50A-1 to 50A-25
110	2	6-21 note, 7A-286 note, 7A-289.22 note, 7A-289.23 note, 7A-289.25 note, 33-2 note, 33-7 note, 50-11.2 note, 50-13.5 note, 50-13.7 note, 50A-1 note
110	3	6-21
110	4	7A-279 note
110	5	7A-286 note
110	6	7A-289.22
110	7	7A-289.23
110	8	7A-289.25
110	9	33-2
110	10	33-7
110	11	50-11.2
110	12	50-13.5
110	13	50-13.7
110	14	50A-1 note
111	. .	28A-12-3
112	1-6	90-321
113	. .	20-7 note
113	. .	20-7
114	. .	136-73 to 136-75 Repealed, 136-77 Repealed
118	. .	128-21 L.M.
119	. .	67-30 L.M.
126	1, 2	20-81.3
129	. .	160A-266 L.M.
131	. .	105-75
134	1	7A-109 note, 14-402 note, 14-409.1 note
134	2	14-402 note, 14-409.1 note
135	1	163-72
135	2	163-72.2
135	3	163-274
135	4	163-72.2 note
136	. .	143-341
137	1, 2	20-81.1
138	1	24-1.1
138	2, 3	24-1.2
138	5	24-9
139	. .	20-57
140	1	163-226
140	2	18A-51
140	3	18A-52
141	. .	104B-3 to 104B-16 Repealed
143	. .	136-55 Repealed
144	1	7A-210
144	2	7A-219
144	3	7A-273
144	4	42-28
144	5	42-30
145	1, 2	20-58
145	3	20-58.1

Ch.	Sec.	1979 General Statutes
145	4	20-58.5
147	. .	122-8.1
148	1	63-65, 63-65 note
148	2	63-66
148	3	113-28.8 rewritten as 63-68, 63-68, 63-68 note
148	4	113-28.11 rewritten as 63-71, 63-71, 63-71 note
148	5	113-28.5 to 113-28.12 rewritten as 63-65 to 63-72, 63-65 to 63-72, 63-65 to 63-72 note
149	. .	63-68, 63-68 note
150	1	105-65.2
150	2	105-62
150	3	105-65.1
150	4	105-79 Repealed
150	5	105-84 Repealed
150	6	105-65.2 note
151	. .	143B-72
152	. .	35-3 Repealed
153	1	143B-340
153	2	143B-341
154	. .	145-9
155	. .	127A-201 to 127A-203
156	1	105-164.13
156	2	105-236
157	. .	106-266.1 to 106-266.5 Repealed
158	1	119-13.1
158	2	119-13.2
159	1	143B-469, 143B-469.1, 143B-469.2, 143B-469.3
159	2	143B-453
159	3	143B-454
159	4	143B-456
159	5	143B-457
159	6	143B-458
159	7	143B-459
159	8	143B-460 Repealed
159	9	143B-469.1 note
160	1	20-65, 20-65 note
160	2	20-65 note
161	. .	129-42.1
162	. .	108-38
163	. .	28A-25-6
164	1	122-75 Repealed, 122-77 to 122-80 Repealed, 122-82.2 Repealed
164	2	122-81.2
164	3	122-58.2
164	4	122-36
164	5	122-81.2 note
165	1	116-201
165	2	116-202
165	3	116-203
165	4	116-209
165	5	116-209.3
165	6	116-209.4
165	7	116-209.14
165	8	116-209.17
165	9	116-209.19
166	1	90-243
166	2, 3	90-241
168	. .	160A-68
169	1	75-16.2
169	2	75-16.2 note
171	1	122-56.7
171	2	122-36
171	3	122-56.2
173	1	20-97, 20-97 note
173	2	20-97 note
174	. .	136-28.1
175	. .	20-129
176	1-3	20-81.6
177	. .	15A-622
178	. .	20-7 note
178	1, 3, 4	20-37.6
178	2	20-7
179	1	105-7.1, 105-7.1 note
179	2	105-130.3, 105-130.5, 105-141, 105-142, 105-144.2, 105-147, 105-158
179	3	105-164.6
179	4	105-202, 105-205
179	4	105-210 Repealed, 105-212
179	5	105-242
179	6	105-210 note
180	1	36A-115
180	2	41-9 Repealed, 41-9 note
180	3	36A-113 note
182	1	143-129
182	2	143-132
183	. .	118-1 L.M.
186	1	29-14
186	2	29-14 note
187	. .	159-7 L.M.
190	. .	20-279.21
191	. .	51-9
192	1	130-80
192	2	130-82.1
192	3	130-83
193	. .	20-81.5
194	. .	105-9
195	. .	105-9
196	1	90-15
196	2	90-15.1

Ch.	Sec.	1979 General Statutes
197	. .	54-109.19
198	. .	54-109.12
199	. .	20-58
200	1	105-275
200	2	105-275 note
201	. .	105-164.13, 105-164.13 note
202	1	106-700, 106-701
202	2, 3	106-700 note
204	. .	62-260
206	1	58-191.3
206	2	58-191.3 note
207	1	131-126.12
208	. .	118-1 L.M.
209	. .	118-1 L.M.
210	. .	163-104 L.M.
214	1	54-2
214	2	54A-10
214	3	54-24.1
214	4	54-2 note, 54-24.1 note, 54A-10 note
216	1	20-97, 20-97 note
216	2	20-97 note
217	. .	20-97, 20-97 note
218	. .	20-116
221	. .	18A-15 L.M.
222	1	119-16.1
224	. .	18A-36.1
225	1	65-73
225	2	65-73 note
226	1	31-24
226	2	10-12, 10-12 note, 10-13, 10-13 note, 31-31.1
226	3	10-12 note, 10-13 note, 31-24 note, 31-31.1 note
226	4	10-12 note, 10-13 note, 31-31.1 note
228	1	106-24
228	2	106-25 to 106-26.2 Repealed
228	3	106-24.1
229	. .	20-190
231	. .	152-1 L.M.
233	1, 2	105-360
235	. .	160A-266 L.M.
238	. .	116-44.5
239	. .	20-79
241	1	108-15.1
242	. .	45-21.42
244	. .	97-29
245	. .	143-166.5
246	. .	97-61.6
247	1	97-13
247	2	97-19
248	1	20-97, 20-97 note
248	2	20-97 note
249	1, 2	97-18
250	. .	97-31
252	1	74-58
252	2	74-64
252	3	74-61
253	1, 2	113-229
253	3	143B-286
253	4	113-230
253	5	113A-118
253	6	113A-122
254	. .	20-288
255	1	53-99
255	2	53-99 note, 53-117 note
262	. .	143-129 L.M., 143-131 L.M.
263	. .	14-118.1
264	. .	118-1 L.M.
267	. .	153A-27 L.M.
268	1	97-88.1
268	2	97-88.1 note
269	. .	62-50
270	. .	160A-303 L.M.
275	. .	160A-272 L.M.
278	. .	18A-16 L.M.
281	. .	152-1 L.M.
282	. .	153A-241 L.M.
283	. .	153A-240 L.M.
285	1	117-2.1
285	2	117-13
285	3	117-16
285	4	117-41 to 117-45
286	1	18A-28
286	2	18A-29
286	3	18A-33
286	4	18A-39
286	5	18A-41
286	6	105-113.93
289	. .	118-1 L.M.
290	. .	69-25.9 L.M.
291	. .	143-129 L.M.
293	. .	54-109.86
295	1	58-155.48
295	2	58-155.48 note
298	1	20-158
298	2	20-169
298	3	136-13, 136-13.1, 136-14
298	4	136-13
299	. .	113A-125
300	1	115-11
301	. .	160A-303 L.M.
303	. .	105-364 L.M.
313	. .	153A-335 L.M.
314	. .	67-30 L.M.
317	. .	160A-266 L.M.
322	. .	115-19 L.M.
323	1	7A-109 note, 14-402 note, 14-409.1 note
323	2	14-402 note, 14-409.1 note
325	1	143B-422 to

Ch.	Sec.	1979 General Statutes
325	1	143B-426.1
326	. .	20-162.1 L.M.
327	. .	115-131 L.M.
328	. .	118-1 L.M.
330	1	47-30
330	2, 3	47-30 L.M.
331	. .	115-157 L.M.
332	1	62-15 note, 62-34 note, 62-51 note, 62-70 note, 62-327 note
332	2	62-70
335	. .	24-1.1B Repealed
336	. .	18A-14
337	. .	160A-241 L.M.
340	. .	116-1 note
341	. .	118-1 L.M., 160A-163 L.M.
343	1, 2	1-42.7
344	1	106-22
345	. .	97-93
348	1	18A-31.1
348	2, 3	18A-38
349	. .	153A-335 L.M.
351	. .	18A-52 L.M.
352	. .	143-129 L.M.
356	1	105-277.1
357	1	163-85
357	2	163-86
357	3	163-88.1
357	4	163-90.1, 163-90.2, 163-90.3
357	5	163-153
357	6	163-85 note
358	1	122-35.35
358	2	122-35.36
358	3	122-35.37
358	4	122-35.38
358	5	122-35.39
358	6	122-35.40
358	7	122-35.41
358	8	Ch. 122, Art. 2F
358	9	Ch. 122, Art. 2F, Part 2
358	10	Ch. 122, Art. 2F, Part 3
358	11	Ch. 122, Art. 2F, Part 4
358	12	122-35.43
358	13	122-35.44
358	14	122-35.45
358	15	122-35.46
358	16	122-35.47
358	17	122-35.48
358	18	122-35.49
358	19	122-35.50
358	20	122-35.51
358	21	122-35.52
358	22	122-35.54
358	23	122-35.37 to 122-35.40, 122-35.46, 122-35.50, 122-35.55
358	24	122-35.56
358	25	122-35.57
358	26	7A-647, 122-35.36, 122-58.16
358	27	122-58.4, 122-58.16, 122-58.19, 122-58.22, 122-85, 143B-140
358	28	122-35.40A
358	29	122-35.53
358	30	122-35.44
358	31, 32	122-35.55
358	33	122-35.40A note
359	1, 2	55-36
361	. .	121-5
362	. .	24-1.1A
363	. .	106-202.6
364	. .	55-160
366	. .	118-1 L.M.
371	. .	160A-272 L.M.
374	. .	97-2
375	. .	153A-132 L.M.
376	. .	135-6
377	1, 2	20-28
378	1, 2	20-28.1
380	. .	20-219.2
384	1	18A-15
384	2	18A-29.1
384	3	18A-30
385	. .	18A-16 L.M.
386	1-8	110-136
386	10	50-13.4
387	1	14-279.1
387	2	14-279.1 note
388	1	113-128
388	2	113-155.1
388	3	113-162
388	4	113-163
388	5	113-187
388	6	113-221
395	1	39-30
395	2	39-30 note
396	. .	135-3
398	. .	20-97, 20-97 note
400	1	20-97, 20-97 note
400	2	20-97 note
401	. .	6-21.1
402	1	159-8
402	2	159-11
402	3	159-13.2
402	4, 5	159-17
402	6	159-26
402	7, 8	159-28
402	9	159-34
403	. .	163-46
404	1	25-9-301
404	2	25-9-312
405	. .	105-203
408	1	14-72
408	2	14-73
408	3	14-72 note, 14-73 note
409	1-6	58-201.1
409	7-9	58-201.2
409	10	58-79.2
409	11	58-201.3
410	. .	143B-386

Ch.	Sec.	1979 General Statutes
411	1	163-22
411	2	163-41.1
411	3	163-96
411	4	163-98
411	5	163-106
411	6	163-109
411	7	163-248
412	1	143-506.6
412	2	143-506.7
412	3	143-506.8
412	4	143-506.9
412	5	143-506.10
412	6	143-506.11
412	7	143-506.12
412	8	143-506.13
412	9	143-506.14
412	11	143-506.6 note
413	1, 2	143-215.54
414	. .	146-6
415	. .	20-30
417	. .	130-50
418	. .	58-155.84
419	. .	20-88
420	1	115-243, 115-244 Repealed
420	2	143-545, 143-546
421	1	58-77
421	2	58-77 note
422	. .	113B-3
423	1	20-4.01, 20-4.01 note
423	2	20-16.2
425	1	163-155
425	2	163-155 note
428	. .	159-163
430	1	143B-280
430	2	143B-280 note
431	1, 2	15-223
431	3, 4	90-96, 90-113.14
432	. .	72-48.1
433	. .	106-371 L.M.
434	1	90-89
434	2	90-90
434	3	90-91
434	4-6	90-92
434	7, 8	90-93
435	. .	116-143.1
436	1, 2	20-118.1
437	. .	14-56
439	. .	105-360 L.M.
440	. .	160A-238 L.M.
441	. .	113-126.2
442	. .	160A-213
443	1, 2	20-81
444	1	159-64
444	2	159-161
445	1	18A-28
445	2	18A-29
445	3	18A-27
445	4	18A-35
445	5	18A-15
446	. .	160A-272 L.M.
447	1	58-213.6 to 58-213.12
447	2	53-213.6 note
448	1	143-437, 143-440
448	2, 3	143-442
448	4, 5	143-443
448	6	143-447
448	7	143-450
448	8	143-454
448	9, 10	143-460
448	11	143-463
448	12	143-464
448	13	143-470.1
450	. .	20-97 L.M.
451	. .	114-289 L.M.
452	. .	44-51.8
453	1, 2	20-179
455	. .	122-35.40
456	. .	15A-1352
457	. .	103-7
458	1	20-97
458	2	20-97 note
459	1	113-315.25
459	2	113-315.26
459	3	113-315.27
459	4	113-315.28
459	5	113-315.29
459	6	113-315.30
459	7	113-315.31
459	8	113-315.32
459	9	113-315.33
459	10	113-315.34
459	11	113-315.35
459	12	113-315.36
459	13	113-315.37
459	14	113-315.38
459	15	113-315.39
459	16	113-315.25 note
460	. .	55B-2
461	1-4	90-210.18
461	6	90-210.20
461	7	90-210.21
461	8, 9	90-210.23
461	10	90-210.24
461	11-21	90-210.25
461	22	90-210.25 to 90-210.29
461	23	90-210.26 note, 90-210.27 note, 90-210.28 note, 90-210.29 note
462	1	115A-1 to 115A-42
462	2	115D-1, 115D-2, 115D-3 to 115D-6, 115D-12 to 115D-25, 115D-31 to 115D-39, 115D-45 to 115D-53, 115D-59 to 115D-61, 115D-68 to 115D-71, 115D-77 to 115D-81
463	1	75C-1 to 75C-5
463	2, 3	75C-1 note
464	1	130-166.16

Ch.	Sec.	1979 General Statutes
464	2	130-166.18
464	3	130-166.21D
464	4	130-166.21D note
464	5	130-166.21E
464	6	130-166.21F
465	. .	7A-133
467	1	147-69.1
467	2	147-69.2
467	3	147-69.3
467	4	58-189
467	5	97-112
467	6	97-114
467	7	115-135
467	8	116-209
467	9	116A-8
467	10	118-22
467	11	120-4.2 note
467	12, 13	128-29
467	14, 15	135-7
467	16	135-7.1 Repealed
467	17	135-7.2 Repealed
467	18	135-66
467	19	143-166
467	20	18A-17
467	21	28A-13-3
467	22	34-13
467	23	54-109.82
468	. .	14-168.1
469	. .	20-37.7
470	1	20-63, 20-63 note
470	2	20-4.2, 20-4.2 note
471	. .	162A-67
472	. .	20-150
473	1, 2	20-79.2
474	1	106-568.34
474	2	106-568.36
475	1	20-369
475	2	20-356 note
476	. .	20-95, 20-95 note
477	1	143-47.6, 143-47.7, 143-47.8, 143-47.9
477	2	147-54.2 Repealed
477	3	143-47.6 note, 143-47.7 note, 143-47.8 note, 143-47.9 note
478	1	53-92
478	2	54-24.1
478	3	143B-439
479	1, 2	94-6
480	. .	163-69.1
481	. .	127A-19
482	. .	18A-15
483	1	53-122
483	2	53-1
483	3	53-14
483	4	53-43
483	5	53-46
483	6	53-48
483	7	53-51
483	8	53-80
483	9	53-91
483	10	53-104
483	11	53-104.1
483	12	53-105
483	13	53-107
483	14	53-108
483	15	53-115
483	16	53-154
483	17	53-155
483	18	53-156
484	. .	54-21.2
485	1, 2	54-19
486	1	7A-378
486	2	7A-376
487	. .	90-270.24 note
487	1	90-256 to 90-270 rewritten as 90-270.24 to 90-270.39, 90-270.24 to 90-270.39, 90-256 to 90-270 note
488	. .	110-141
489	. .	14-289 L.M.
493	1	77-13, 77-14
493	2	77-13 note, 77-14 note
494	. .	163-9
495	. .	105-259
496	. .	108-24
497	. .	58-248.36
498	. .	143-260.10
499	. .	20-71
500	1	163-278.6
500	2	163-278.7
500	3	163-278.9
500	4	163-278.16
500	5, 6	163-278.17
500	7	163-278.23
500	8	163-278.24
500	9	163-278.22
500	10	163-278.27
500	11	163-278.28
500	12,13	163-278.22
500	14	163-278.30
500	15	163-278.37
500	16	163-278.9
502	1	105-113.70
502	2	105-113.72
502	3	105-113.88
504	1	143B-75 to 143B-78 Repealed
504	2	143B-81, 143B-82 Repealed
504	3	143-521 to 143-526 Repealed
504	8	131-120
504	9	143B-169 to 143B-172 Repealed
504	10	143B-197 to 143B-201 Repealed
504	13	143B-216.6 to 143B-216.7 Repealed

Ch.	Sec.	1979 General Statutes
504	14	131-120
504	15	130-9
504	16	108-75.5 Repealed
505	. .	115-257.6 to 115-257.13
506	. .	115-257.19 to 115-257.26
508	1	55-45, 55-45 note
508	2	55-56, 55-56 note
509	1	28A-19-3
509	3	28A-14-3 note, 28A-19-3 note
509	2	28A-14-3
510	1	108-61.5, 108-61.6
510	2	108-48
510	3	108-61.5 note
511	. .	14-4 L.M.
512	1, 2	159-188
513	. .	112-1
514	1	113B-4
514	2	113B-9
515	. .	20-122
516	1	143B-490, 143B-491, 143B-492
516	2, 3	143-166.2
516	4	97-2
516	5	97-2
516	6	167-2 Repealed
517	1, 2	163-273.19
518	. .	162-4 Repealed
519	1	139-6
519	2	139-7
520	2	130-128
521	. .	143-151.13
522	1	143-151.26 note
522	2	143-151.26 to 143-151.36 note
522	3	143-151.27
522	4	143-151.28
522	5	143-151.29
523	. .	136-13.2
524	. .	14-33
525	1	1-21
525	2	1-75.10
525	3	7A-289.28
525	4	28A-19-12
525	5	31-42
525	6	31B-3
525	7	31B-2
525	8	39-12
525	9	39-12 note
525	10	50-4
525	11	90-220.4
525	12	1-21 note, 1-75.10 note, 1-501 note, 31B-2 note, 31B-3 note, 39-12 note, 50-4 note, 90-220.4 note
525	13	1-501
526	. .	14-221.2
527	1	105-164.4
527	2	105-164.6
528	. .	58-61.2
529	. .	90-21.21 Repealed
530	1	20-97
530	2	20-97 note
532	. .	72-1
533	. .	90-238
534	1	163-221
534	2	163-122
534	3	163-296
534	4	163-296, 163-299
534	5	163-122 note, 163-221 note, 163-296 note, 163-299 note
535	1	143-215.75
535	2	143-215.76
535	3-10	143-215.77
535	11	143-215.78
535	12	143-215.79
535	13	143-215.82
535	14	143-215.83
535	15	143-215.84
535	16, 17	143-215.85
535	18, 19	143-215.86
535	20	143-215.87
535	21, 22	143-215.88
535	23	143-215.89
535	24	143-215.90
535	25, 26	143-215.91
535	27	143-215.92
535	28	143-215.93
535	29	143-215.94
536	1	31-11.6
536	2	31-11.6 note
537	. .	113-208
538	1	57-2.1
538	2	57-2.1 note
539	1-3	163-72
539	4	163-275
539	5	163-67
540	. .	143B-216.5
541	1	150A-58
541	2	150A-63
541	3	120-30.24
542	. .	49-17
543	. .	54-136
544	. .	143-341
545	1	143-215.107
545	2, 3	143-215.108
545	4-6	143-215.114
545	7	143-215.112
545	8-10	143-213
546	. .	113-84 L.M.
547	1	122-56.10
547	2	122-56.10 note
550	. .	90-96
551	. .	153A-103
552	. .	20-162
553	. .	115D-2
554	1	90A-37
554	2	90A-37

Ch.	Sec.	1979 General Statutes
554	2	to 90A-41,
		90A-43,
		90A-44
554	3, 4	90A-40
554	5	90A-42
555	1	20-13
555	2	20-13.1 Repealed
555	3	20-13 note
555	3	20-13.1 note
556	. .	113-126.2
557	. .	118-1 L.M.
558	1	143-151
558	2	143-151.1
558	3	143-148
558	4	143-151.2,
		143-151.3,
		143-151.4,
		143-151.5
558	5, 6	143-146
558	7	143-146 note,
		143-148 note,
		143-151 note,
		143-151.1 note,
		143-151.2 note,
		143-151.3 note,
		143-151.4 note,
		143-151.5 note
559	1	12-3.1
559	2	12-3.1 note
560	1	104-31, 104-32
560	2	104-33
561	1	50B-1 to
		50B-7
561	2	14-134.3
561	3	15A-401
561	4	15A-534.1
561	5	50-7
561	7	50B-8
561	8	14-134.3 note,
		50-7 note,
		50B-1 note
562	. .	116-65
563	. .	50-13.5
564	. .	113A-57
565	. .	15A-2000
566	. .	143-215.67
567	1	20-137.2
567	2	20-137.2 note
570	1, 2	84-17
570	3	84-18
570	4	84-19
570	5	84-22
570	6, 7	84-28
570	8	84-28.1
570	9	84-37
571	1	150A-59,
		150A-60
571	2	120-30.25
572	. .	31A-5
573	. .	75-30
574	1-4	20-4.01
574	5	20-50.1 Repealed
574	6	20-51
574	7	20-8
574	8	20-10.1
574	9	20-10.1 note
575	1	143B-402, 143B-403
		Repealed,
		143B-403.1, 143B-403.2,
		143B-412, 143B-413
		Repealed
575	2	143B-403.1 note
576	1	8-50.1
576	2	49-7
576	3	7A-304
576	4	7A-315
578	. .	125-7
579	1	25-9-603
579	2	1-594
580	. .	45-18
581	. .	143-292
583	. .	160A-277
584	1	7A-29
584	2	105-342
584	3	105-345,
		105-345.1 to
		105-345.5,
		105-346
584	4	7A-29 note,
		105-342 note,
		105-345 note
585	1	108-65.1
585	2	108-65.2 note
586	. .	117-30
589	1	106-605
589	2	106-610
590	1	106-92.1 to
		106-92.16
590	2	106-92.1 note
591	1	147-50
591	2	147-50.1
591	4	147-50.1 note
592	1	14-86.1
592	2	14-86.1 note
593	. .	15-11.1
594	. .	45-70
595	1	153A-301
595	2	160A-536
595	3	153A-301 note,
		160A-536 note
597	. .	22B-1
598	. .	160A-296
599	. .	97-18
600	1-5	115-157
601	1	58-173.1
601	2, 3	58-173.2
601	4	58-173.10
602	. .	7A-211.1
603	1	20-37.8
603	2	20-37.8 note
604	. .	20-63
605	1	105-277
605	2	105-277 note
606	1, 2	54-30

Ch.	Sec.	1979 General Statutes
607	. .	18A-26
608	. .	146-30
609	1	18A-51
609	2	18A-30
610	. .	64-1.1
611	2	153A-335
611	3	153A-344
611	4	153-345
611	5	153A-369
611	6	153A-321
612	. .	20-79
613	. .	20-141.1
614	1	93A-16 to 93A-26
614	2, 3	93A-4
614	6	93A-4, 93A-4 note
614	7	93A-16 note
615	1	14-107.1
615	2	14-107.1 note
616	1	93A-3
616	2	93A-3, 93A-4
616	3-5	93A-4
616	6, 7	93A-6
616	8	93A-3 note
616	9	143-34.11, 143-34.11 note
617	. .	18A-17
618	2	77-20
619	1	153A-274
619	2	160A-311
619	3	159-48
619	4	153A-149
619	5	160A-209
619	6	153A-301
619	7	130-128
619	8	162A-2
619	9	162A-32
619	10	162A-65
619	11	153A-185
619	12	160A-216
619	13	153A-284
619	14	160A-317
620	. .	1B-1
621	. .	130-13
622	. .	7A-147
623	. .	148-119, 148-120
624	1	159-48
624	2, 3	162A-86
624	4	162A-87
624	5	162A-88
624	6, 7	159-48 note, 162A-86 note, 162A-87 note, 162A-88 note
625	1, 2	105-164.13, 105-164.13 note
626	. .	106-134.1
627	1-3	20-79.2
628	. .	58-155.60
629	. .	143-34.11,
629	. .	143-34.11 note, Ch. 143B, Art. 2, Part 6 note
630	. .	54-25.1
631	. .	20-88, 20-88 note
632	. .	20-37.6
633	1	143-213
633	2-4	143-215
633	5	143-215.1
633	6	143-214.1, 143-215.3
633	7, 8	143-215.3
633	9-11	143-215.6
634	1	143B-216.8, 143B-216.9
634	2	143B-216.8 note
635	. .	153A-345
636	1	51-18
636	2	51-18 note
637	1	159-31
637	2	159-33
637	3	147-79
637	4	147-78
639	1	160A-288.1
639	2	153A-212
640	. .	14-363.2
641	. .	14-360
643	1	10-16.1
643	2	10-16.1 note
644	. .	160A-399.1, 160A-399.2, 160A-399.3, 160A-399.4, 160A-399.5, 160A-399.6, 160A-399.7, 160A-399.8, 160A-399.9, 160A-399.10, 160A-399.11, 160A-399.12, 160A-399.13
646	. .	160A-395, 160A-395.1, 160A-396, 160A-397, 160A-398, 160A-398.1, 160A-399
647	1	78A-17
647	2, 3	78A-30
648	. .	1-352.1
649	1	116-37.1
649	2, 3	116-36
650	. .	128-9 Repealed
651	. .	15A-601
652	1	62-3
652	2	62-110.1
653	1	20-130.1
653	2	20-125
654	1	99B-1 to 99B-4
654	2	1-50

Ch.	Sec.	1979 General Statutes
654	3	1-15(b) Repealed, 1-52, 1-53
654	4	1A-1 Rule 8
654	5	1-15 note, 1-50 note, 1-52 note, 1-53 note, 1A-1, Rule 8 note, 99B-1 note
654	6	1-15 note, 1-50 note, 1-52 note, 1-53 note, 1A-1, Rule 8 note, 99B-1 note
654	7	1-15 note, 1-50 note, 1-52 note, 1-53 note 1A-1, Rule 8 note, 99B-1 note
654	8	99A-1 note
655	1	143-318.1 to 143-318.8 Repealed 143-318.9, 143-318.10, 143-318.11, 143-318.12, 143-318.13, 143-318.14, 143-318.15, 143-318.16, 143-318.17, 143-318.18
655	2	159-17
655	3	143-318.9 note
655	4	143-318.9 note
656	. .	14-33
657	. .	110-1 to 110-20 note
658	1	136-44.35
658	2	136-44.36
658	3	136-44.37, 136-44.38
658	4	153A-244
659	. .	105-147
660	1	96-3
660	2	96-4
660	3-12	96-8
660	13-15	96-9
660	16	96-10
660	17	96-11
660	18, 19	96-12
660	20, 21	96-13
660	22	96-17
660	23-25	96-18
660	26	96-21
660	27	96-22
660	28	96-25
660	29-31	96-13
661	. .	14-401.6
662	2	15A-1343

Ch.	Sec.	1979 General Statutes
665	1	105-342
665	2	105-342 note
667	1	20-4.01, 20-4.01 note
667	2	20-4.18, 20-4.18 note
667	3-11	20-7, 20-7 note
667	12	20-7.01, 20-7.01 note
667	13	20-8, 20-8 note
667	14	20-9, 20-9 note
667	15, 16	20-11, 20-11 note
667	17	20-12, 20-12 note
667	18	20-16, 20-16 note
667	19	20-16.1, 20-16.1 note
667	20	20-17, 20-17 note
667	21	20-20, 20-20 note
667	22	20-23, 20-23 note
667	23	20-26, 20-26 note
667	24	20-27, 20-27 note
667	25	20-29, 20-29 note
667	26	20-29.1, 20-29.1 note
667	27	20-30, 20-30 note
667	28	20-33 Repealed
667	29	20-37.1, 20-37.1 note
667	30	20-37.7, 20-37.7 note
667	31	20-141.3, 20-141.3 note
667	32	20-166, 20-166 note
667	33	20-166.1, 20-166.1 note
667	34	20-179 note
667	35	20-182, 20-182 note
667	36	20-218, 20-218 note
667	37	20-279.13, 20-279.13 note
667	38	20-279.32, 20-279.32 note
667	39	20-320, 20-320 note
667	40	20-4.01 note, 20-4.18 note, 20-7 note, 20-7.01 note, 20-8 note, 20-9 note, 20-11 note, 20-12 note, 20-14 note, 20-15 note, 20-16 note, 20-16.1 note, 20-17 note, 20-18 note, 20-20 note, 20-21 note, 20-22 note, 20-23 note, 20-23.1 note, 20-24 note, 20-26 note, 20-27 note, 20-28 note, 20-29 note, 20-29.1 note, 20-30 note, 20-34.1 note,

Ch.	Sec.	1979 General Statutes
667	40	20-37 note,
		20-37.1 note,
		20-37.7 note,
		20-141.3 note,
		20-166 note,
		20-166.1 note,
		20-179 note,
		20-182 note,
		20-218 note,
		20-279.13 note,
		20-279.32 note,
		20-320 note,
667	41	20-7, 20-9,
		20-9 note, 20-11,
		20-14, 20-14 note,
		20-15, 20-15 note,
		20-16, 20-16 note,
		20-16.1, 20-16.1 note,
		20-17,
		20-18, 20-18 note,
		20-20, 20-20 note,
		20-21, 20-21 note,
		20-22, 20-22 note,
		20-23.1, 20-23.1 note,
		20-24, 20-24 note,
		20-28, 20-28 note,
		20-29.1, 20-29.1 note,
		20-30, 20-30 note,
		20-34.1, 20-34.1 note,
		20-37, 20-37 note,
		20-179
667	43	20-7.01 note
668	1	143B-440,
		143B-441
668	2	143B-433
668	3	143B-443
669	1	7A-289.30
669	2	7A-289.32
670	1	90-270.2
670	2	90-270.3
670	3	90-270.4
		to 90-270.6,
		90-270.6 note,
		90-270.10,
		90-270.16,
		90-270.16 note
670	4	90-270.4
670	5, 6	90-270.11
671	1	90-113.9
671	2	90-113.10
671	3	90-113.11
671	4	90-113.12
671	5	90-113.13
671	6	90-113.13 note
672	. .	14-52
673	1	94-1
673	2	94-4
673	3	94-5
673	4	94-6
673	5	94-7
674	1, 2	153A-447
675	. .	20-279.21
676	1, 2	58-248.33
678	. .	20-7 note
678	1-3	20-7
680	. .	20-4.01,
		20-4.01 note
681	1	45-36.3
681	2	45-36.3 note
682	1	14-27.1 to
		14-27.10
682	2	15A-136
682	3	15-166
682	4	15-169
682	5	14-6
682	6	14-17
682	7	14-21 to 14-27
		Repealed
682	8	8-58.6
682	9	15A-2000
682	10	15-144.1
682	11	15-144.2
682	12	8-58.6 note,
		14-6 note,
		14-17 note,
		14-21 to
		14-27 note
682	13, 14	8-58.6 note,
		14-6 note,
		14-17 note,
		14-21 to
		14-27 note
683	1	18A-2
683	2	18A-8
683	3	18A-31
683	4	18A-31.1
683	5, 6	18A-38
683	7	105-113.78
683	8	105-113.85
683	9	18A-57
683	10	18A-31.1
683	11, 12	18A-38
683	13	18A-52
683	14	105-113.78
683	15	103-113.85
684	. .	24-10
685	1	159-41
685	2	159-41 note
686	1	105-277.8
686	2	105-277.8 note
687	. .	14-361.1
688	. .	20-183.7
689	1	63-78
689	2	63-79
689	3	63-80
689	4	63-81
689	5	63-82
689	6	63-83
689	7	63-84
689	8	63-85
689	9	63-86
689	10	63-87
689	11	63-88
689	12	63-89

Ch.	Sec.	1979 General Statutes
690	1	157-9
690	2, 3	157-16
690	4	157-21
690	5	157-17.1
690	6	157-9 note, 157-16 note, 157-17.1 note, 157-21 note
691	1	108-44
691	2	108-44 note
692	. .	14-316.1
694	1	104E-10
694	2	131-66.18
694	3	104E-7
694	4	104E-9
694	5	104E-23
694	6	104E-7 note, 104E-9 note, 104E-10 note, 104E-23 note, 130-166.18 note
695	1	86-1 to 86-25 rewritten as 86A-1 to 86A-26, 86A-1 to 86A-26, 86-1 to 86-25 note, 86A-1 note
695	2	86A-4 note
695	3	86A-17 note
696	. .	20-343
697	1	90-270.45 to 90-270.62
697	2	8-53.5
697	3	90-270.49 note
697	4	8-53.5 note, 90-270.45 note
698	. .	33-69
699	1	18A-5
699	2	18A-9 Repealed
699	4	18A-64 — 18A-68
699	5	105-113.72
699	6	105-113.72 note
700	1	45-40
700	2	161-22.2
701	1	127A-138
701	2	127A-139
702	1	108-23
702	2	108-25 to 108-28 Repealed
702	3	Ch. 108, Art. 2, Pt. 3, 108-40 note
702	4	108-40
702	5	108-42
702	6	Ch. 108, Art. 2, Pt. 4, 108-51 note
702	7	108-60
702	8	108-62
702	9	108-62.1
702	10	108-65.2, 108-65.3
703	. .	47-17.1
704	. .	105-109.1
705	1	66-106 to 66-112
705	2	66-106 note
706	1	25A-2
706	2	53-190
706	3	24-2.1
707	. .	130-266.1
708	. .	126-8.1
709	1	50-6
709	2	50-19
709	3	50-13.5
709	4	50-16.8
709	5	50-19 note
710	. .	90-270.14
711	1	15A-1215
711	2	9-18
712	. .	143-34.11 note
712	1	87-52
712	2	87-53
712	3	87-59
712	4	87-61.1, 87-64.1
712	5	87-52 note
712	6	143-34.11
712	7	87-53
713	. .	143-34.11 note
713	1	87-2
713	2	87-10
713	3	87-11
713	4	87-13.1, 87-15.2
713	5	87-2 note
713	6	87-4
713	7	87-5
713	8	87-6
713	9	143-34.11
714	1	97-1
714	2	15A-405, 20-185, 58-72, 58-131.36, 69-25.8, 97-13, 97-45, 97-52, 97-64, 97-105, 97-107, 97-108, 97-109, 97-110, 97-113, 97-114, 97-115, 97-116,

Ch.	Sec.	1979 General Statutes
714	2	97-117,
		97-122,
		105-228.5,
		115-159.1,
		115-160,
		115-192,
		115D-23,
		130-11,
		143-166.5,
		143-296,
		143B-491,
		160A-164,
		160A-282,
		160A-283,
		166A-14
714	3	97-2
714	4	22B-1,
		97-1.1,
		97-6.1 note,
		99B-2 note
714	5	97-1.1 note
714	6	97-1.1 note
715	1	90-320
715	2	90-322
715	3	90-323
716	. .	14-91
717	1	147-69.1
717	2	159-30
717	3	28A-13-3
718	. .	18A-30
719	1-4	115-185
720	. .	14-234
723	. .	15A-979
724	1	75-31
724	2	75-30 note
725	1-3	15A-301
725	4	15A-401
726	. .	28A-12-3
727	2	159-44
727	3	159-48
727	4	159-81
727	5	159-97
728	. .	90-271
729	. .	15-27.2
730	. .	163-278.9
731	6	116-187,
		116-189
732	. .	58-248.31
733	1	143B-95
733	2	143B-98
734	1	19A-23
734	2	19A-39
735	. .	65-2
736	. .	Ch. 143, Art. 21,
		Part 3 note
736	. .	143-34.11 note
736	1	143-34.11
737	1, 2	113-271
738	1	97-6.1
738	2	1-55
739	1, 2	48-25
740	. .	Ch. 143B, Art. 7,
740	. .	Part 6 note
740	. .	143-34.11 note
740	1	143-34.11,
		14-113.8,
		14-113.9,
		14-113.10,
		14-113.11,
		14-113.12,
		14-113.13,
		14-113.14,
		14-113.15,
		14-113.15 note,
		14-113.16,
		14-113.16 note,
		14-113.17,
		14-113.17 note
742	1	146-17.1
743	. .	160A-20
744	. .	Ch. 113A, Art. 7 note,
		143-34.11 note,
		143-34.12 note,
		143-34.13 note
744	1	Ch. 74, Art. 7 note,
		Ch. 76, Art. 6 note,
		Ch. 78A, Art. 5 note,
		Ch. 81A, Art. 5 note,
		Ch. 84, Art. 4 note,
		Ch. 85C note,
		Ch. 90A, Art. 2 note,
		Ch. 90A, Art. 3 note,
		Ch. 93 note,
		Ch. 95, Art. 5 note,
		Ch. 113A, Art. 4 note,
		Ch. 143B, Art. 7,
		Part 9 note,
		Ch. 143B, Art. 7,
		Part 8 note,
		143-34.11,
		143-34.12,
		160A-460
744	2	143-34.11, 143-34.12,
		160A-465 Repealed
744	3	143-34.11, 143-34.12,
		Ch. 143B, Art. 9,
		Pt. 15 note
744	4	143-34.12,
		143-34.13
744	5	143-34.16
744	6	143-34.15
744	7	143-34.19
744	8	116-210, 116-211,
		Repealed
745	1	153A-139
745	2	160A-301
746	. .	20-81.5
747	1	121-34 to
		121-42
747	10	121-34 note
748	1	113-95
748	2	113-95.2
748	3	113-95.5
748	4	113-95.6

Ch.	Sec.	1979 General Statutes
748	5	113-96.1
748	6	113-271
748	7	113-272
748	8	113-272.1
748	9	113-95 note, 113-95.2 note, 113-95.5 note, 113-95.6 note, 113-96.1 note, 113-271 note, 113-272 note, 113-272.1 note
749	1-3	15A-1344
749	4	15A-1345
749	5-7	15A-1351
749	8	15A-1355
749	9, 10	15A-1371
749	11	15A-1374
750	. .	143-34.11 note, 143-34.12 note
750	1	143-34.11
750	2	Ch. 93 note, 143-34.11
750	3	93-1
750	4	93-2
750	5	93-4
750	6-10	93-12
750	11	93-12.1
751	1	35-1.7
751	2, 3	35-1.8
751	4	35-1.10
751	5	35-1.11
751	6	35-1.12
751	7	35-1.13
751	8	35-1.14, 35-1.17
751	9-13	35-1.15
751	14-17	35-1.16
751	19	35-1.19
751	20	35-1.31
751	21, 22	35-1.32
751	23	35-1.34
751	24	35-1.35
751	25	35-1.36
751	26	35-1.38
751	27	35-1.39
751	28	122-36
751	29	35-1.1
751	30	35-38 note
751	31	35-1.9, 35-1.12, 35-1.15
751	32, 33	35-2
751	34	35-4
752	1	143B-178
752	2	143B-179
754	1	130-170.2
755	1	58-364 to 58-372
755	2-4	58-176, 58-176 note
755	5-7	58-177,
755	5-7	58-177 note
755	8	58-250, 58-250 note
755	9-12	58-251.1, 58-251.1 note
755	13	58-251.2, 58-251.2 note
755	14	58-254.2, 58-254.2 note
755	15	58-254.7, 58-254.7 note
755	16	58-347, 58-347 note
755	17	57-3, 57-3 note
755	18	57B-8, 57B-8 note
755	19	58-9
755	20	57-3 note, 58-9 note, 58-176 note, 58-177 note, 58-250 note, 58-251.1 note, 58-251.2 note, 58-254.2 note, 58-254.7 note, 58-347 note, 58-360 note
757	. .	11-7.1
758	1	15A-1353
758	2	15A-1431
759	1	143-49
760	1	14-1.1, 14-2, 14-2 note
760	2	15A-1340.1 — 15A-1340.7
760	3	15A-1021, 15A-1021 note, 15A-1414, 15A-1414 note, 15A-1442, 15A-1442 note, 15A-1444, 15A-1444 note,
760	4	14-2.1, 14-2.1 note, 14-7.1 note, 14-7.1 to 14-7.6 Repealed, 14-263 Repealed, 15A-1351, 15A-1351 note, 15A-1354 note, 15A-1354, 15A-1354 note, 15A-1355, 15A-1355 note, 15A-1370.1, 15A-1380.1, 15A-1380.2,

Ch.	Sec.	1979 General Statutes
760	4	148-13,
		148-13 note,
		162-46 note
760	5	14-3, 14-3 note,
		14-6 note, 14-7,
		14-7 note, 14-8,
		14-8 note, 14-9,
		14-9 note, 14-12,
		14-12 note, 14-12.1,
		14-12.1 note, 14-12.15,
		14-12.15 note, 14-13,
		14-13 note, 14-14,
		14-14 note, 14-17,
		14-17 note, 14-18,
		14-18 note,
		14-19 Repealed,
		14-20, 14-20 note,
		14-21 to 14-27,
		14-28, 14-28 note,
		14-29, 14-29 note,
		14-30, 14-30 note,
		14-30.1, 14-30.1 note,
		14-31, 14-31 note,
		14-32, 14-32 note,
		14-34.1, 14-34.1 note,
		14-34.2, 14-34.2 note,
		14-39, 14-39 note,
		14-41, 14-41 note,
		14-42, 14-42 note,
		14-43, 14-43 note,
		14-44, 14-44 note,
		14-45, 14-45 note,
		14-46, 14-46 note,
		14-49, 14-49 note,
		14-49.1, 14-49.1 note,
		14-50, 14-50 note,
		14-52, 14-52 note,
		14-53, 14-53 note,
		14-54, 14-54 note,
		14-55, 14-55 note,
		14-56, 14-56 note,
		14-56.1, 14-56.1 note,
		14-56.3, 14-56.3 note,
		14-57, 14-57 note,
		14-58, 14-58 note,
		14-58.2, 14-58.2 note,
		14-59, 14-59 note,
		14-60, 14-60 note,
		14-61, 14-61 note,
		14-62, 14-62 note,
		14-62.1, 14-62.1 note,
		14-63, 14-63 note,
		14-64, 14-64 note,
		14-65, 14-65 note,
		14-66, 14-66 note,
		14-67, 14-67 note,
		14-67.1, 14-67.1 note,
		14-72, 14-72 note,
		14-72.2, 14-72.2 note,
		14-74, 14-74 note,
		14-75.1, 14-75.1 note,
		14-79, 14-79 note,
760	5	14-87, 14-87 note,
		14-87.1,
		14-88, 14-88 note,
		14-89, 14-89 note,
		14-89.1, 14-89.1 note,
		14-90, 14-90 note,
		14-91, 14-91 note,
		14-92, 14-92 note,
		14-94, 14-94 note,
		14-95, 14-95 note,
		14-98, 14-98 note,
		14-99, 14-99 note,
		14-100, 14-100 note,
		14-101, 14-101 note,
		14-113.9, 14-113.9 note,
		14-113.17, 14-113.17 note,
		14-118.4, 14-118.4 note,
		14-119, 14-119 note,
		14-120, 14-120 note,
		14-121, 14-121 note,
		14-122, 14-122 note,
		14-123, 14-123 note,
		14-124, 14-124 note
		14-136, 14-136 note,
		14-141, 14-141 note,
		14-163, 14-163 note,
		14-177, 14-177 note,
		14-178, 14-178 note,
		14-183, 14-183 note,
		14-190.8, 14-190.8 note,
		14-202.1, 14-202.1 note,
		14-209, 14-209 note,
		14-211, 14-211 note,
		14-212, 14-212 note,
		14-214, 14-214 note,
		14-217, 14-217 note,
		14-218, 14-218 note,
		14-219, 14-219 note,
		14-220, 14-220 note,
		14-221, 14-221 note,
		14-221.1, 14-221.1 note,
		14-233, 14-233 note,
		14-254, 14-254 note,
		14-258, 14-258 note,
		14-258.1, 14-258.1 note,
		14-258.2, 14-258.2 note,
		14-258.3, 14-258.3 note,
		14-259, 14-259 note,
		14-278, 14-278 note,
		14-288.2, 14-288.2 note,
		14-288.6, 14-288.6 note,
		14-288.9, 14-288.9 note,
		14-320.1, 14-320.1 note,
		14-322.1, 14-322.1 note,
		14-329, 14-329 note,
		14-373, 14-373 note,
		14-374, 14-374 note,
		14-377, 14-377 note,
		14-398, 14-398 note,
		14-401.11, 14-401.11 note,
		14-415.1,
		14-415.1 note, 18A-56,

Ch.	Sec.	1979 General Statutes
760	5	20-106, 20-106 note, 20-109, 20-109 note, 20-177, 20-177 note, 20-182, 20-182 note, 53-129, 90-95, 90-95 note, 90-95.1, 90-95.1 note, 90-98, 90-98 note, 90-108, 90-108 note, 130-69, 130-69 note, 148-45, 148-45 note, 148-46.1, 148-46.1 note
760	6	14-1.1 note, 14-2 note, 14-2.1 note, 14-3 note, 14-6 note, 14-7 note, 14-7.1 note, 14-8 note, 14-9 note, 14-12 note, 14-12.1 note, 14-12.15 note, 14-13 note, 14-14 note, 14-17 note, 14-18 note, 14-19 note, 14-20 note, 14-21 to 14-27 note, 14-28 note, 14-29 note, 14-30 note, 14-30.1 note, 14-31 note, 14-32 note, 14-34.1 note, 14-34.2 note, 14-39 note, 14-41 note, 14-42 note, 14-43 note, 14-44 note, 14-45 note, 14-46 note, 14-49 note, 14-49.1 note, 14-50 note, 14-52 note, 14-53 note, 14-54 note, 14-55 note, 14-56 note, 14-56.1 note, 14-56.3 note, 14-57 note, 14-58 note, 14-58.2 note, 14-59 note, 14-60 note, 14-61 note, 14-62 note, 14-62.1 note, 14-63 note, 14-64 note, 14-65 note, 14-66 note, 14-67 note, 14-67.1 note, 14-72 note, 14-72.2 note, 14-74 note, 14-75.1 note, 14-79 note, 14-87 note, 14-87.1 note, 14-88 note, 14-89 note, 14-89.1 note, 14-90 note, 14-91 note, 14-92 note, 14-94 note, 14-95 note, 14-98 note, 14-99 note, 14-100 note, 14-101 note, 14-113.9 note, 14-113.17 note, 14-118.4 note, 14-119 note, 14-120 note, 14-121 note, 14-122 note, 14-123 note, 14-124 note, 14-136 note, 14-141 note, 14-150 note, 14-163 note, 14-177 note, 14-178 note, 14-183 note, 14-190.8 note, 14-202.1 note, 14-209 note,
760	6	14-211 note, 14-212 note, 14-214 note, 14-217 note, 14-218 note, 14-219 note, 14-220 note, 14-221 note, 14-221.1 note, 14-233 note, 14-254 note, 14-258 note, 14-258.1 note, 14-258.2 note, 14-258.3 note, 14-259 note, 14-278 note, 14-288.2 note, 14-288.6 note, 14-288.9 note, 14-320.1 note, 14-322.1 note, 14-329 note, 14-373 note, 14-374 note, 14-377 note, 14-398 note, 15A-1340.1 note, 14-401.11 note, 14-415.1 note, 20-106 note, 20-109 note, 20-177 note, 20-182 note, 90-95 note, 90-95.1 note, 90-98 note, 90-108 note, 148-13 note, 148-45 note, 148-46.1 note, 130-69 note, 162-46 note
761	1-7	75A-5
761	8	75A-18
761	9	75A-5 note
762	1	28A-25-6
762	2	111-18.1
762	3	111-18.1 note
763	1	17C-1 — 17C-12
763	2	17D-1 — 17D-4
764	1, 2	113-99.1
765	. .	20-130.2
766	1	163-41
766	2	163-67
767	1	14-56.1
767	2	14-56.3
768	. .	101-8
769	. .	113-84
770	. .	15A-922
771	1, 2	90-123
771	3	90-122
772	. .	36A-53
773	1	58-3.2
773	2	58-188.9
773	3	58-3.2 note, 58-188.9 note
775	. .	158-13
776	1	105-130.10A
776	2	105-147
776	3	105-130.10A note
777	. .	58-79
778	1	143-134.1
778	2	143-34.1 note
779	. .	14-320
780	. .	143-34.11 note
780	1	95-37 to 95-47 rewritten as 95-47.1 to 95-47.13, 95-47.1 to 95-47.13, 95-37 to 95-47 note, 95-47.1 note
780	2	95-47.19 to 95-47.32
780	3	143-34.11

Ch.	Sec.	1979 General Statutes
780	4	95-47.1 note, 95-47.19 note
781	. .	90-101
782	. .	163-41
783	. .	143B-147
784	. .	31-25.1
785	. .	163-128
786	2	136-13.2
787	1, 2	15A-1352
788	1	166.39 to 166.56
788	2	130-158 Repealed, 130-159 Repealed, 130-160, 130-161 to 130-166 Repealed
788	3	130-30, 130-31, 130-32, 130-33 Repealed, 130-34 Repealed, 130-35 Repealed
788	4	130-157 transferred to 130-9.6, 130-9.6
788	5	130-205
789	1	160A-241
789	2	153A-149
790	. .	20-97, 20-97 note
791	. .	159-81
792	. .	62-300
793	. .	115-163 L.M.
794	. .	152-1 L.M.
796	. .	62-330
797	1, 2	163-72
797	3	163-251
797	4	163-255
797	5	163-108
797	6	163-137
798	1	54A-1
798	2	54A-13
798	3-6	54A-13 note
799	1-3	163-227.2
799	4	163-226.3
799	5	163-231
799	6	163-226.3 note
800	. .	163-213.8
801	. .	20-7 note
801	2	7A-311
801	3	15A-1343
801	4	18A-15
801	5, 6	20-7
801	7	20-42
801	8	20-74
801	9	20-84
801	10	20-84.1
801	11	20-85
801	12	20-94
801	13	28A-21-2
801	14	54-1
801	15	54-18.6, 54-18.6 note
801	16	105-2
801	17-19	105-3
801	20, 21	105-4
801	22	105-14
801	23	105-22
801	24	105-23
801	25-27	105-37
801	28	105-113.83, 105-113.83 note
801	29	105-113.84, 105-113.84 note
801	30	105-113.86
801	31	105-113.95
801	32	105-130.5
801	33	105-130.7
801	34	105-130.25, 105-130.25 note
801	35	105-130.26, 105-130.26 note
801	36	105-135
801	37-39	105-141
801	40	105-144.5, 105-144.5 note
801	41-47	105-147
801	48-66	105-149
801	67	105-151.4, 105-151.4 note
801	68	105-151.5, 105-151.5 note
801	69	105-159.1
801	70	105-163.1
801	71	105-163.16
801	72	105-164.3
801	73	105-164.4
801	74, 75	105-164.13
801	76	105-164.13A, 105-164.13A note
801	76.1	105-164.14 note
801	77	105-164.14
801	78	105-164.14 note
801	79-82	105-164.14
801	83	105-164.16
801	84, 85	105-199
801	86, 87	105-212
801	88	105-228.23
801	89	105-228.24
801	90	105-266
801	91	105-266.1
801	92	105-446.5
801	93	105-449.24
801	94	105A-1 to 105A-16, 105A-1 note
801	95	121-5
801	107	105-446.5 note
802	1	163-151
802	2	163-169
802	3	163-170
803	1, 2	105-130.22
803	3, 4	105-151.1
804	. .	162A-6
805	. .	157-9
806	. .	163-299
807	. .	42-37.1 to 42-37.3
808	1	19A-45 — 19A-49
808	2	19A-1
808	3	19A-3
808	4	19A-4
808	5	6-18
809	1	54-109.27

Ch.	Sec.	1979 General Statutes
809	2	54-109.82
810	1	122-5.4
810	2	122A-1 note, 122A-5.4 note
811	1	14-5.1
811	2	14-5.1 note
814	. .	20-183.7 note
815	1	7A-277 to 7A-289, 7A-289.7, 7A-516, 7A-517, 7A-523, 7A-524, 7A-530 to 7A-536, 7A-542 to 7A-552, 7A-558 to 7A-565, 7A-571 to 7A-578, 7A-584 to 7A-588, 7A-594 to 7A-602, 7A-608 to 7A-612, 7A-618 to 7A-621, 7A-627 to 7A-640, 7A-646, 7A-647, 7A-648 to 7A-658, 7A-664 to 7A-669, 7A-675 to 7A-678, 7A-684 to 7A-711, 7A-717 to 7A-726, 7A-732
815	2	110-22 Repealed, 110-23.1 Repealed, 110-24 Repealed, 110-58 to 110-64.9 Repealed, 110-115 to 110-123 Repealed
815	3	134A-18 Repealed, 134A-19 Repealed, 134A-23 Repealed, 134A-24 Repealed, 134A-27 Repealed, 134A-28 Repealed, 134A-30 to 134A-33 Repealed
815	4, 5	7A-516 note, 7A-523 note, 7A-530 note, 7A-542 note, 7A-558 note, 7A-571 note, 7A-584 note, 7A-594 note, 7A-608 note, 7A-618 note, 7A-627 note, 7A-646 note, 7A-664 note, 7A-675 note, 7A-684 note, 7A-717 note, 7A-732 note
816	1	114-19.1
816	2	114-19.1 note
817	. .	156-79 L.M.
818	1	74B-1 to 74B-16 Repealed, 74C-2
818	2	74C-1, 74C-3 to 74C-20
818	3	74C-1 note, 74C-10 note, 74C-13 note
819	. .	143-34.11 note
819	1	89C-4
819	2	89C-5
819	3, 4	89C-17
819	5	89C-25.1, 89C-25.2
819	6	89C-4 note
819	7	143-34.11
820	1-6	42-34
820	7	42-32
820	8	42-44
820	9	7A-227
820	10	1A-1 Rule 62
821	. .	115-35.1
823	. .	18A-16 L.M.
824	1	58-124.19
824	2	58-124.20
824	3	58-124.21
824	4	58-124.22
824	5	58-124.26
824	6	124.29, 124.30
824	7	58-30.4
824	8	58-27.2 note, 58-30.4 note, 58-124.17 note, 58-125 to 58-131.9 note, 58-131.10 to 58-131.25 note, 58-131.26 to 58-131.33 note, 58-131.34 note, 58-176 note, 58-248.26 note, 58-248.29 note, 58-248.30 note, 58-248.32 note, 58-248.33 note, 58-248.34 note, 58-248.35 note, 58-248.37 note, 97-100 note, 97-102 to 97-104.6 note
824	9-11	58-30.4 note, 58-124.19 note, 58-124.20 note, 58-124.21 note, 58-124.22 note, 58-124.26 note, 58-124.29 note, 58-124.30 note
826	. .	135-4
828	. .	115-73.11
829	. .	143-151.13
830	1	113-78 Repealed, 113-81.4 to 113-81.13 Repealed, 113-82 Repealed, 113-83 Repealed, 113-84 to 113-95.6 Repealed, 113-96 to 113-99 Repealed, 113-100 to 113-109 Repealed, 113-109.6 to 113-109.8 Repealed, 113-110.1 to 113-112 Repealed, 113-113 Repealed, 113-113.6 to 113-113.14 Repealed, 113-113.20 to 113-113.23 Repealed, 113-114 to 113-120 Repealed, 113-120.1 to 113-120.4 transferred to 14-159.6 to 14-159.9, 113-120.5 Repealed,

Ch.	Sec.	1979 General Statutes
830	1	113-120.6 Repealed, 113-120.7 Repealed, 113-121 to 113-126.1 Repealed, 113-128, 113-128 note, 113-129, 113-130, 113-132, 113-133.1, 113-134.1, 113-135 to 113-137, 113-139 Repealed, 113-261, 113-262, 113-264, 113-267, 113-270.1 to 113-270.5, 113-271, 113-271 note, 113-272, 113-272 note, 113-272.1 Repealed, 113-272.2 to 113-277, 113-291, 113-291.1 to 113-294, 113-300.1 to 113-300.2, 113-301 Repealed, 113-301.1 to 113-302.1, 113-306, 113-307, 113-316, 113-317 Repealed, 113-318 to 113-320 Repealed, 113-321, 113-322 Repealed
830	2	113-24 note, 113-78 note, 113-81.4 to 113-81.13 note, 113-82 note, 113-83 note, 113-84 note, 113-85 to 113-94 note, 113-95 note, 113-95.1 note, 113-95.5 note, 113-95.3 to 113-95.4 note, 113-95.5 note, 113-95.6 note, 113-96 note, 113-96.1 note, 113-97 note, 113-98 note, 113-99 note, 113-100 note, 113-101 note, 113-102 note, 113-103 note, 113-103.1 note, 113-104 note, 113-105 — 113-105.3 note, 113-106 note, 113-107 note, 113-108 note, 113-109 note, 113-109.6 to 113-109.8 note, 113-110.1 note, 113-111 note, 113-112 note, 113-113 note, 113-113.6 to 113-113.14 note, 113-113.20 to 113-113.23 note, 113-114 to 113-120, 113-120.1 to 113.120.4 note, 113-120.5 note, 113-120.6 note, 113-120.7 note, 113-121 to 113-126.1 note, 113-139 note, 113-272.1 note, 113-301 note, 113-317 note, 113-321 note, 113-322 note
830	3	160A-180 note, 160A-188
830	4	66-58, 66-58 note
830	5	113-24 Repealed
830	6	113-39, 113-39 note
830	7	143-246, 143-246 note
830	8	143-254.1 Repealed
830	9	75A-16 Repealed
830	10	143-442, 143-442 note
830	11	113-120.1 to 113-120.4 transferred to 14-159.6 to 14-159.9, 14-159.6 to 14-159.9 note, 14-159.10
830	12	15A-1343, 15A-1343 note
830	13	103-2
830	14	113-133.1
830	15	106-549.94
830	17	14-159.10 note, 75A-16 note, 106-549.94 note, 113-24 note, 113-78 note,. 113-81.4 to 113-81.13 note, 113-82 note, 113-83 note, 113-84 note, 113-85 to 113-94 note, 113-95 note, 113-95.1 note, 113-95.2 note, 113-95.3 to 113-95.4 note, 113-95.5 note, 113-95.6 note, 113-96 note, 113-96.1 note, 113-97 note, 113-98 note, 113-99 note, 113-100 note, 113-101 note, 113-102 note, 113-103 note, 113-103.1 note, 113-104 note, 113-105 — 113-105.3 note, 113-106 note, 113-107 note, 113-108 note, 113-109 note, 113-109.6 to 113-109.8 note, 113-110.1 note, 113-111 note, 113-112 note, 113-113 note, 113-113.6 to 113-113.14 note, 113-113.20 to 113-113.23 note, 113-114 to 113-120 note, 113-120.1 to 113-120.5 note, 113-120.6 note, 113-120.6 note, 113-120.7 note, 113-121 to 113-126.1 note, 113-129 note, 113-130 note, 113-130 note, 113-135.1 note, 113-139 note, 113-270.2, 113-270.3 note, 113-270.4 note, 113-270.5 note, 113-271 note, 113-272.1 note, 113-291.1 note, 113-291.2 note, 113-291.4 note, 113-301 note, 113-317 note, 113-321 note, 113-322 note
831	1	14-453 to 14-457
831	2	14-453 note
832	1	20-279.1
832	2	20-279.5
832	3-5	20-279.15

Ch.	Sec.	1979 General Statutes
832	6, 7	20-279.21
832	8	20-279.25
832	9, 10	20-280
832	11	20-281
832	12, 13	20-279.1 note, 20-279.5 note, 20-279.15 note, 20-279.21 note, 20-279.25 note, 20-280 note, 20-281 note
833	1	66-118 to 66-125
833	2	66-118 note
834	. .	143-34.11 note
834	1	87-16
834	2, 3	87-17
834	4-7	87-21
834	8	87-22
834	9	87-23
834	10	87-27
834	11	87-25.1, 87-27.1
834	12	87-16 note
834	13	143-34.11
835	. .	66-41 to 66-49 rewritten as 66-49.24 to 66-49.50, 66-41 to 66-49 note, 66-49.24 note
836	. .	116-143.1
837	. .	14-107
838	17	138-7
838	18	138-5
838	22	143-27.2
838	24	108-61.7
838	25-27	143-127.1
838	28	14-322.2 Repealed
838	29	50-13.8
838	35	143-31.3
838	43	143B-173
838	44	143B-174, 143B-174 note
838	45	131-52 to 131-60 Repealed, 131-61 to 131-75 Repealed, 131-76 to 131-82 Repealed
838	46	131-60.6, 131-60.6 note
838	82	120-37
838	84	7A-171.1
838	85	7A-101
838	92	120-3 note
838	97	143-166
838	98	135-14 note
838	99	135-5
838	100-102	143-166
838	104	135-65
838	105	143-166
838	117, 118	7A-133
838	119	7A-41
838	122	7A-41 note, 7A-101 note, 7A-133 note, 7A-171.1 note,
838	122	108-61.7 note, 120-3 note, 120-37 note, 131-60.6 note, 135-5 note, 135-65 note, 138-5 note, 138-7 note, 143-27.2 note, 143-31.3 note, 143-127.1 note, 143-166 note, 143B-173 note
838	123	108-61.7 note, 143-27.2 note, 143-31.3 note
839	1	95-15 to 95-25 rewritten as 95-25.1 note, 95-25.1 to 95-25.25, 95-15 to 95-25 note
839	2	95-85 to 95-96 Repealed, 95-161 to 95-172 Repealed, 110-1 to 110-20 Repealed
843	1, 2	87-58
843	3, 4	87-64
844	. .	122A-8
846	1	105-277.1
846	2	105-309
847	. .	115-166
848	. .	93D-11
849	1	24-10
850	. .	15A-502
856	. .	115-19 L.M.
861	1	121-7
861	2	121-11
861	3-5	121-12
861	6	143B-62
862	1	135-5
862	2	128-27
862	3	126-16
862	4, 5	135-5
862	6, 7	128-27
862	8	116-11
862	9	126-16 note
863	. .	143-136
864	1	143-552, 143-553, 143-554, 143-555, 143-556, 143-557, 143-558, 143-559, 143-560, 143-561, 143-562
864	2	115-142
864	3	120-102
865	1	97-10.2

Ch.	Sec.	1979 General Statutes
865	2	97-10.2 note
866	1	128-26
866	2	135-4
867	. .	135-4
868	1, 2	128-26
869	. .	143-166.2
870	. .	127A-40
871	. .	143-34.11 note
871	1	83-1 to 83-13 rewritten as 83A-1 to 83A-17, 83A-1 to 83A-17 note
871	2	143-34.11
872	. .	143-34.11 note
872	1	89A-3
872	2, 3	89A-4
872	4	89A-5
872	5	89A-6
872	6	143-34.11
872	7	89A-3 to 89A-6 note, 143-34.11 note, 143-34.12 note
873	2	14-204.1
873	3	14-204.1 note
874	1	115-147
874	2	115-374
876	1	57A-1 to 57A-29 rewritten as 57B-1 to 57B-25 57A-1 to 57A-29 note, 57B-1 note
876	2	131-178
877	.	143-295
878	2	7A-52
878	3	7A-53
879	1	75-32 to 75-35
879	2	75-32 note, 75-33 note, 75-34 note, 75-35 note
881	1	42-40, 58-9
881	2	42-40, 58-9 note
882	. .	20-187.2
883	1	33-74
883	2	33-69
884	1	7A-39.3
884	2	7A-39.6
885	. .	115-183
886	. .	143-300.6
887	. .	20-130.1
888	1-3	65-53
888	4	65-63
888	5, 6	65-64
888	7	65-66
888	8	65-70
888	9	65-60.1
888	10	65-53 note, 65-60.1 note, 65-63 note, 65-64 note, 65-66 note, 65-70 note
889	. .	143-215.2
891	. .	133-1.1
892	1	105-130.23
892	2	105-151.2
893	1	14-292
893	2	14-292.1
893	3	14-289
893	4	14-290
893	5	14-291
893	6	14-291.1
893	7	14-292.1 note
893	8	14-292.1 note
893	9	14-292.1 note
893	10	18A-30
893	11	18A-35
893	12	14-292.1 note
894	1	141-7.1
894	2	141-7.1 note
895	1, 2	14-402
895	3, 4	14-409.1
895	5	14-402 note, 14-409.1 note
896	1	115D-2, 115D-2 note
896	2	115D-2.1
896	3	115D-3, 115D-3 note
896	4	115D-4, 115D-4 note
896	5-7	115D-5, 115D-5 note
896	8	115D-6, 115D-6 note
896	9	115D-62
896	12	115D-3 note
896	13	115D-14, 115D-14 note, 115D-15, 115D-15 note, 115D-17, 115D-17 note, 115D-19, 115D-19 note, 115D-20, 115D-20 note, 115D-23, 115D-23 note, 115D-25, 115D-25 note, 115D-31, 115D-31 note, 115D-33, 115D-33 note, 115D-36, 115D-36 note, 115D-39, 115D-39 note, 115D-45, 115D-45 note, 115D-47, 115D-47 note, 115D-48, 115D-48 note, 115D-49, 115D-49 note, 115D-50, 115D-50

Ch.	Sec.	1979 General Statutes
896	13	note, 115D-51, 115D-51 note, 115D-59, 115D-59 note, 115D-77, 115D-77 note, 115D-78, 115D-78 note, 115D-79, 115D-79 note, 115D-80, 115D-80 note, 116D-11, 116-11D note, 116D-15, 116-15D note
897	1	14-318.4
897	2	14-318.4 note
898	1	143B-426.2 to 143B-426.7
898	2	143B-426.3 note
899	1	7A-343.1
900	1	143B-426.8 to 143B-422.13
900	3	143B-426.8 note
901	1, 2	143-340
902	. .	160A-475
903	1, 2	20-179
903	3	20-179.2, 20-179.2 note
903	4-6	20-19
903	7, 8	20-140
903	9, 10	20-26
903	11	20-27
903	12	20-23.2
903	14	20-179.2 note
904	. .	143-34.11 note
904	1-3	87-39
904	4-7	87-43.1
904	8-10	87-44
904	11	87-47
904	12	87-50 note
904	13	87-50.1
904	14	87-48
904	15	143-34.11
905	. .	159-40
906	. .	145-10
907	. .	108-48
908	1	54-131
908	2	54-134
908	3	54-146
909	. .	14-344
910	. .	75-53
915	1	122-58.2
915	2	122-58.1
915	3	122-58.3
915	4	122-58.4
915	5	122-58.5
915	6	122-58.6
915	7	122-58.7
915	8	122-58.8
915	9	122-58.11
915	10	122-58.19
915	11	122-58.1
915	12	122-58.24
915	13	122-58.7
915	15	122-58.8
915	16	122-58.8
915	17	122-58.11
915	18	122-58.3
915	19	122-58.9
915	20	122-58.25, 122-58.26
915	21, 22	122-58.14
915	24	122-58.25 note, 122-58.26 note
917	4	20-63
920	1, 2	95-69.10
922	1	113A-61
922	2	113A-54
925	. .	108-61.8
926	1	163-278.43
926	2	163-278.34 note
927	. .	15A-1373
929	. .	143-214.3
929	3	143-214.3
930	. .	143-340
931	. .	143-215.107
932	9	120-74
934	. .	143B-454.1
935	. .	115-11
942	1	114-4.2D
942	2	114-4.2D note
945	2	126-64 to 126-68
945	3	126-64 note
946	1	115D-31
964	1	106-202.12 to 106-202.19
964	2	14-128.1 Repealed, 14-129.1 Repealed
965	1	118-24.2
965	3	118-24.2
967	. .	50-13.2
969	. .	24-10
970	. .	20-7.1
971	1	115-146.1
971	2	143-300.13, 143-300.14, 143-300.15, 143-300.16, 143-300.17, 143-300.18
971	3	143-300.12 note
971	4	115-146.1 note
972	1	135-1
972	2	135-3
972	3	135-4
972	4	135-5
972	5	135-33
972	6	135-34
972	7	135-36
973	1	143B-163
973	2	143B-164
974	. .	128-27
975	. .	135-5
976	1, 2	143-166

Ch.	Sec.	1979 General Statutes
977	1	143B-162
977	2	143B-162, 143B-162 note
978	1	143-126.1
978	2	143-126.1 note
979	1	58-21.2
979	2, 3	58-21.2 note
980	. .	8-37
981	1	113A-202, 113A-203
981	2	14-284.2
981	3-5	143-215.77
983	1	143B-181.3, 143B-181.4
983	2	143B-181.3 note
985	. .	7A-312
986	1	115-142.4
986	3	115-142.4 note
991	. .	7A-171.1
996	1	143B-185
996	2	130-186.9
996	4	130-186.9 note, 143B-184 note
1002	1	138-6
1005	1	90-270.4
1005	2	90-270.6
1005	3	90-270.16
1005	4	90-270.15
1008	. .	163-211
1009	. .	105-212
1010	. .	121-6
1016	1	143B-393
1016	2	143B-394.4, 143B-394.5, 143B-394.6, 143B-394.7, 143B-394.8, 143B-394.9
1016	4	143B-394.4 note
1017	1	90-76 Repealed, 90-76.1 to 90-76.6
1017	2	90-76.1 note
1018	1, 2, 2A	15A-701
1026	1	106-21.1
1026	2	106-21.1 note
1027	. .	55A-15
1030	2	120-30.11 note, 120-30.17 note, 120-30.24 note, 150A-2 note, 150A-12 note, 150A-58 note
1030	3	120-30.26
1044	1-4	108-104
1044	5	108-106.2
1046	1	143-215.70, 143-215.71, 143-215.72, 143-215.73
1046	2	139-54
1046	3	143-215.70
1050	1	138-6
1053	1	143-291
1053	2	143-300.7
1053	3	143-300.7 note
1054	1	143B-342
1054	2	143B-343
1054	3	143B-344
1054	4	143B-344.1
1054	5	143B-344.2
1054	6	143B-342 note
1057	1, 2	135-14
1058	1-6	143-166.01
1058	7	143-166.01 note
1059	1	128-26
1063	1	128-27 note
1063	2	128-27
1065	1	14-399
1067	1	120-57
1069	1.1	115-198.2
1069	2	115-198.2 note
1072	1	7A-41
1072	2	7A-133
1072	3	7A-133, 7A-133 note
1072	4	7A-133 note
1072	5	7A-102 note
1072	6	7A-60 note
1072	7	7A-141 note
1072	8	7A-69 note
1072	10	7A-355, 7A-356
1072	12	7A-355 note
1073	1-3	163-278.6
1073	4, 5	163-278.7
1073	6	163-278.9A
1073	7	163-278.19A
1073	8	163-278.13
1073	9	163-278.17
1073	10	163-278.20
1073	11	163-278.38
1073	12, 13	163-278.23
1073	14	163-278.24
1073	15	163-278.27
1073	16	163-278.7
1073	17	163-278.23
1073	18	163-278.7, 163-278.22
1073	19	163-278.6, 163-278.14, 163-278.16, 163-278.20, 163-278.27, 163-278.34
1073	20	163-278.6, 163-278.7, 163-278.10 to 163-278.13, 163-278.16
1073	21	163-278.6 note, 163-278.7 note, 163-278.8 note, 163-278.9A note,

Ch.	Sec.	1979 General Statutes
1073	21	163-278.10 note, 163-278.11 note, 163-278.12 note, 163-278.13 note, 163-278.14 note, 163-278.16 note, 163-278.17 note, 163-278.19A note, 163-278.20 note, 163-278.22 note, 163-278.23 note, 163-278.24 note, 163-278.27 note, 163-278.34 note, 163-278.38 note
1074	1	115-53.1
1074	2	153A-248
1075	1	164-25
1075	2	164-26
1075	3	164-27
1075	4	164-28
1075	5	164-29
1075	6	164-30
1075	7	164-31
1075	8	164-32
1075	9	164-33
1075	10	164-34
1075	12	164-25 note
1076	1	18A-27
1077	1	7A-506 to 7A-510
1077	3	7A-506 note

SESSION LAWS 1979, 2ND SESSION

Ch.	Sec.	General Statutes
1079	1	130-152.2
1079	2	130-154
1080	1	5A-21
1080	2-4	5A-23
1080	5	7A-103
1080	6	7A-292
1081	. .	143-129
1082	1, 2	115-39
1083	1, 2	58-59
1084	. .	105-164.29
1085	1	105-242
1085	2	105-368
1086	1	105-449.10
1086	2	105-449.42, 105-449.45
1087	1, 2	93-12
1087	3	143-34.12
1088	1	48-6
1088	2	7A-289.32
1089	. .	20-139.1
1090	. .	14-309.1
1092	. .	105-275
1094	1	143B-139.3
1094	2	153A-259
1094	3	153A-445
1094	4, 5	160A-497
1094	6	143B-139.3 note, 153A-259 note, 153A-445 note, 160A-497 note
1097	. .	143-34.12
1098	. .	105-449.39
1099	1	105-164.13
1100	1	105-164.6, 105-164.6 note
1100	2	105-468, 105-468 note
1101	. .	105-164.13A
1105	. .	118-1 L.M.
1106	. .	118-7 L.M.
1108	1, 2	157-39.1
1108	3	157-39.4
1109	. .	105-141
1113	. .	160A-487 L.M.
1119	. .	20-219.2
1120	. .	160A-266 L.M.
1126	. .	18A-16 L.M.
1130	1	115D-2, 115D-3 to 115D-6, 115D-14, 115D-15, 115D-17, 115D-19, 115D-20, 115D-23, 115D-25, 115D-31, 115D-33, 115D-36, 115D-39, 115D-45, 115D-47 to 115D-51, 115D-59, 115D-77 to 115D-80
1130	2	115D-3
1130	3	143B-6
1130	4	115-235.9
1130	5	115D-2.1
1131	1	105-214
1135	1-6	153A-299.1 to 153A-299.6
1135	7	153A-299.1 note
1137	9	120-3 note
1137	9.1	120-3
1137	11	7A-171.1
1137	12	7A-101
1137	25	143-4
1137	26	138-6
1137	27	138-8
1137	28	7A-44
1137	29	138-5
1137	29.1	143-4
1137	30	120-3.1
1137	31	147-11
1137	32	147-33
1137	35	115-142.01
1137	37	143-1, 143-2, 143-3.1,

Ch.	Sec.	1979, 2nd Sess. General Statutes
1137	37	143-3.2, 143-4, 143-11.1, 143-19, 143-20, 143-28, 143-31.1, 143-34.2
1137	38	143-341
1137	39	143-344
1137	40	126-5
1137	41	143-3.5
1137	41.1	150A-11
1137	41.2	143B-14
1137	43	143-27.1 Repealed
1137	44	143-34.1
1137	45	143-34.2
1137	46	160A-486
1137	48	105-213
1137	49	105-472
1137	50	136-41.1
1137	51	105-113.86
1137	53	53-96
1137	62	143-28.1
1137	63, 64	135-5
1137	65	143-166
1137	66	135-5
1137	67	135-14 note
1137	68	143-166
1137	69	135-65
1137	72	143-166
1137	77	7A-44 note, 7A-101 note, 7A-171.1 note, 53-96 note, 105-113.86 note, 105-213 note, 105-472 note, 115-142.01 note, 138-5 note, 138-6 note, 138-8 note, 143-1 note, 143-2 note, 143-3.1 note, 143-3.2 note, 143-3.5 note, 143-4 note, 143-11.1 note, 143-19 note, 143-20 note, 143-28 note, 143-28.1 note, 143-31.1 note, 143-34.1 note, 143-34.2 note, 143-166 note, 143-341 note, 143-344 note, 143B-14 note, 147-11 note, 147-33 note,
1137	77	150A-11 note, 160A-486 note
1137	79	115-142.01 note, 143-3.5 note, 143-28.1 note
1139	..	160A-209 L.M.
1144	..	118-1 L.M.
1147	1, 2	54-18.3
1147	3	54-33.3
1147	4	54-21.2
1147	5	54-21.5
1148	1	78A-28
1148	2	78A-36
1148	3	78A-50
1152	..	20-97
1153	1	20-97
1153	2	20-97 note
1155	1	20-97
1155	2	20-97 note
1156	..	115-185
1157	1	24-1
1157	2, 3	24-12
1157	4	24-13
1157	5, 6	24-14
1157	7	24-15 Repealed
1158	1	143-215.3
1158	2	143-211
1158	3	143-215.3
1158	4	143-215.3
1158	5, 6	143B-283
1159	..	58-173.27
1160	..	20-16.2
1161	1	57-30 to 57-38
1161	2	58-370
1161	3	58-371
1163	..	152-1 L.M.
1164	..	143-129 L.M.
1167	..	69-25.10 L.M., 143-129 L.M.
1168	..	15A-402 L.M., 160A-286 L.M.
1169	..	160A-399.6 L.M.
1170	..	1-596 L.M.
1173	1, 2	143-34.12, 143-34.13
1174	..	18A-51
1175	..	105-164.6
1176	..	90-270.11
1178	1	113-270.2
1178	2	113-270.3
1178	3	113-271
1178	4	113-272
1178	5	113-270.3, 113-271, 113-272
1179	1	105-163.05
1179	2	105-163.05 note
1180	1	20-39
1180	2	20-128.2
1180	3	20-183.3
1180	4	20-183.8
1180	5, 6	20-183.7

Ch.	Sec.	1979, 2nd Sess. General Statutes
1180	7.1	20-39 note, 20-128.2 note, 20-183.3 note, 20-183.7, 20-183.8 note
1180	8	20-128.2 note
1181	. .	164-33, 164-34
1182	. .	45-80
1183	1	105-4
1184	1, 2	17C-6
1184	3	8-50.2
1184	4	8-50.2 note
1185	1	47-108.11
1187	1	105-436.1
1187	2	105-446.3:1
1187	3	105-449.16
1187	4, 5	105-449.24
1187	6	105-436.1 note, 105-446.3:1 note, 105-449.16 note, 105-449.24 note
1188	1	99B-10
1188	2	106-21.2
1188	3	106-141.1
1189	. .	20-97
1191	. .	20-81.4
1192	1	90-48.7 to 90-48.11
1192	2	90-48.7 note
1193	1	93A-32 to 93A-38
1193	2	93A-32 note
1195	1-5	90-22
1195	6	90-29.1
1195	7, 8	90-41
1195	9	90-43
1195	10	90-29
1195	11	90-29.5
1195	12	90-39
1195	13	90-47 Repealed
1195	14	90-223
1195	15	90-29
1196	1	135-5
1196	2	128-27
1198	. .	108-54
1199	. .	143-214.1
1200	. .	143-129 L.M.
1201	. .	160A-488
1206	1	7A-289.23
1206	2	7A-289.32, 9-6.1
1206	3	7A-451
1206	6	7A-289.23 note, 7A-289.32 note, 7A-451 note
1207	1	9-6
1207	2	9-6.1
1207	3	9-10
1207	4	9-6.1 note, 9-10 note
1209	1, 2	143-215.77
1209	3	143-215.77A
1210	1	114-4.2E
1210	2	114-4.2E note
1212	2	96-4
1212	10	62-333
1212	15	62-333 note, 96-4 note
1213	. .	128-27
1214	. .	143-166
1215	1	143-166
1215	2	143-166, 143-166 note
1216	. .	135-5
1217	. .	135-33
1219	1	62-3
1219	2	62-156
1221	1	7A-41
1221	2	7A-133
1221	3	7A-102 note
1221	4	7A-102 note
1221	5	7A-60 note
1221	6	7A-508 note
1225	1-5	143-166
1227	. .	135-56.1
1234	1	7A-305
1234	2	7A-305 note
1236	. .	115-151.16 to 115-151.18
1238	1	122A-3
1238	2	122A-8
1240	. .	128-27
1241	. .	143B-223
1242	. .	163-66
1245	1	143B-173
1245	2	143B-174
1246	1	28A-17-12
1247	1	160A-64
1247	2	160A-68
1247	3	160A-69
1247	4	160A-70
1247	5	160A-71
1247	6	160A-74
1247	7	160A-75
1247	8, 9	160A-77
1247	10	160A-79
1247	11	160A-102
1247	12	160A-104
1247	13	160A-103
1247	14	160A-104
1247	15	160A-103
1247	16	160A-155
1247	17	160A-158
1247	18, 19	160A-162
1247	20	160A-193
1247	21	160A-209
1247	22	160A-210 Repealed
1247	23	160A-248
1247	24	160A-267
1247	25	160A-269
1247	26	160A-272
1247	27	160A-272.1
1247	28	160A-282
1247	29	160A-312
1247	30	160A-349.3
1247	31	160A-349.7
1247	32	160A-349.11

Ch.	Sec.	1979, 2nd Sess. General Statutes
1247	33	160A-349.14
1247	34	160A-349.15
1247	35	160A-361
1247	36	160A-364
1247	37	160A-388
1247	38	160A-445
1247	39	160A-458, 160A-458.1
1247	40	Ch. 160A, Art. 19, Pt. 8
1247	41	160A-490
1247	42	160A-478
1247	43	160A-495
1247	44	160-475 to 160-484 transferred to 160A-550 to 160A-559, 160-490 to 160-492 transferred to 160A-560 to 160A-562, 160-494 to 160-496 transferred to 160A-563 to 160A-565, 160A-550 to 160A-565
1247	45	160-496.1 to 160-496.14 transferred to 160A-575 to 160A-588, 160A-575 to 160A-588
1248	. .	143-135
1250	1	120-111.1 to 120-111.4
1251	1	14-17, 14-17 note
1251	3	14-17 note
1251	4-6	90-95
1251	7	90-95, 90-95 note
1251	8	90-95 note
1251	9	14-17 note, 90-95 note
1262	1-8	120-30.41 to 120-30.48
1265	1	105-130.27
1265	2	105-151.6
1265	3	105-130.27 note
1266	1-3	150A-63
1272	1	143-166.13 to 143-166.19
1272	2	20-185
1272	3	114-13
1272	5	20-185 note, 114-13 note, 143-166.13 note
1276	. .	118-1 L.M.
1278	. .	7A-343.1
1279	1	20-309
1279	2	20-311
1280	1	20-65 Repealed
1280	2, 3	20-66
1282	. .	90-280
1283	1	7A-740 to 7A-742, 7A-744
1283	3	7A-740 note
1284	1	7A-465
1284	2	7A-466
1285	1	113-129
1285	2	113-133.1
1285	3	113-272.5
1285	4-6	113-291.1
1285	7	113-291.2
1285	8	113-291.3
1285	9	113-300.1
1285	10	113-301.1
1285	11	113-133.1
1295	. .	115-1.1
1299	1	115-315.7 to 115-315.12 Repealed
1299	2	115-377
1301	1	105-141
1302	1, 2	54-152
1302	3	24-1.3 Repealed
1304	1	105-75 Repealed
1304	2	105-75.1
1304	3	105-75.1 note
1306	1	140-1 to 140-5.1 recodified as 140-5.12 to 140-5.17, 140-5.12 to 140-5.17
1306	2	143B-61.1
1306	3	100-2 to 100-7
1306	4	100-2, 100-8
1306	5	143B-54 to 143B-57 Repealed
1306	6	143B-61.1 note
1307	. .	105-141 L.M.
1308	1	20-97
1308	2	20-97 note
1309	. .	162-42 L.M.
1310	1	143B-476
1310	2	166A-1, 166A-4 to 166A-7, 166A-9, 166A-10, 166A-12 to 166A-14
1310	3	113A-202 Repealed, 113A-203 Repealed
1311	1	116A-1 to 116A-11 Repealed, 116B-1 to 116B-49
1311	2	28A-22-9
1311	3	53-18
1311	4	53-20
1311	5	53-43.7
1311	6	55-130
1311	7	58-241.15
1312	1, 2	108-61.2
1312	3-5	108-61.4
1313	. .	15A-1002
1314	1	120-30.26
1314	2	120-30.27
1314	3	120-30.26 note
1315	. .	118-1 L.M.
1316	1	14-1.1,

Ch.	Sec.	1979, 2nd Sess. General Statutes
1316	1	14-1.1 note
1316	2	14-3, 14-3 note
1316	3	14-6 note
1316	4	14-27.2, 14-27.2 note
1316	5	14-27.3, 14-27.3 note
1316	6	14-27.4, 14-27.4 note
1316	7	14-27.5, 14-27.5 note
1316	8	14-27.6, 14-27.6 note
1316	9	14-27.7, 14-27.7 note
1316	10	14-56, 14-56 note
1316	11	14-72, 14-72 note
1316	12	14-87, 14-87 note
1316	13	14-168.1, 14-168.1 note
1316	14	14-221.2, 14-221.2 note
1316	15	14-225.2, 14-225.2 note
1316	16	14-282, 14-282 note
1316	17	14-284.2, 14-284.2 note
1316	18	14-318.4, 14-318.4 note
1316	19	14-454, 14-454 note
1316	20	14-455, 14-455 note
1316	21	14-457, 14-457 note
1316	22	20-30, 20-30 note
1316	23	21-42, 21-42 note
1316	24	108-48 note
1316	25	108-61.5 note
1316	26	108-61.6 note
1316	27, 28	163-275, 163-275 note
1316	29	105-113.61, 105-113.61 note
1316	30, 31	15A-1340.1
1316	32	15A-1340.2
1316	33	15A-1340.3
1316	34	15A-1340.5 transferred to 14-2.2, 14-2.2 note
1316	35	15A-1340.6 Repealed
1316	36-38	15A-1340.7
1316	39	15A-1345, 15A-1345 note
1316	40	15A-1354 note
1316	41	15A-1370.1
1316	42	15A-1371, 15A-1371 note
1316	43-46	148-13, 148-13 note
1316	47	14-1.1 note, 14-2 note, 14-2.1, 14-2.1 note, 14-3 note, 14-6 note,
1316	47	14-7 note, 14-7.1 to 14-7.6 note, 14-8 note, 14-9 note, 14-12 note, 14-12.1 note, 14-12.15 note, 14-13 note, 14-14 note, 14-17 note, 14-18 note, 14-19 note, 14-20 note, 14-21 to 14-23 note, 14-26, 14-27 note, 14-28 note, 14-29 note, 14-30 note, 14-30.1 note, 14-31 note, 14-32 note, 14-34.1 note, 14-34.2 note, 14-39 note, 14-41 note, 14-42 note, 14-43 note, 14-44 note, 14-45 note, 14-46 note, 14-49 note, 14-49.1 note, 14-50 note, 14-52 note, 14-53 note, 14-54 note, 14-55 note, 14-56 note, 14-56.1 note, 14-56.3 note, 14-57 note, 14-58 note, 14-58.2 note, 14-59 note, 14-60 note, 14-61 note, 14-62 note, 14-62.1 note, 14-63 note, 14-64 note, 14-65 note, 14-66 note, 14-67 note, 14-67.1 note, 14-72 note, 14-72.2 note, 14-74 note, 14-75.1 note, 14-79 note, 14-87 note, 14-88 note,

Ch.	Sec.	1979, 2nd Sess. General Statutes
1316	47	14-89 note,
		14-89.1 note,
		14-90 note,
		14-91 note,
		14-92 note,
		14-94 note,
		14-95 note,
		14-98 note,
		14-99 note,
		14-100 note,
		14-101 note,
		14-113.9 note,
		14-113.17 note,
		14-118.4 note,
		14-119 note,
		14-120 note,
		14-121 note,
		14-122 note,
		14-123 note,
		14-124 note,
		14-136 note,
		14-141 note,
		14-150 note,
		14-163 note,
		14-177 note,
		14-178 note,
		14-183 note,
		14-190.8 note,
		14-202.1 note,
		14-209 note,
		14-211 note,
		14-212 note,
		14-214 note,
		14-217 note,
		14-218 note,
		14-219 note,
		14-220 note,
		14-221 note,
		14-221.1 note,
		14-233 note,
		14-254 note,
		14-258 note,
		14-258.1 note,
		14-258.2 note,
		14-258.3 note,
		14-259 note,
		14-263 note,
		14-278 note,
		14-288.2 note,
		14-288.6 note,
		14-288.9 note,
		14-320.1 note,
		14-322.1 note,
		14-329 note,
		14-373 note,

Ch.	Sec.	1979, 2nd Sess. General Statutes
1316	47	14-374 note,
		14-377 note,
		14-398 note,
		14-401.11 note,
		14-415.1 note,
		15A-1021 note,
		15A-1340.1 note,
		15A-1351 note,
		15A-1354 note,
		15A-1355 note,
		15A-1370.1 note,
		15A-1380.1 note,
		15A-1414 note,
		15A-1442 note,
		15A-1444 note,
		18A-56 note,
		20-106 note,
		20-109 note,
		20-177 note,
		20-182 note,
		53-129 note,
		90-95 note,
		90-95.1 note,
		90-98 note,
		90-108 note,
		148-13 note,
		148-45 note,
		148-46.1 note,
		162-46 note
1316	48	15A-1340.5 note,
		15A-1340.6 note
1317	. .	15A-701
1318	1	105-130.26
1318	2	105-151.5
1319	. .	153A-239 L.M.,
		153A-240 L.M.
1320	1, 2	58-41.1
1321	. .	160A-514 L.M.
1322	. .	14-404 L.M.
1323	. .	20-217
1324	2	113-133.1
1325	. .	163-162.1 note
1326	. .	9-10 note
1327	1	58-31.2
1327	2	58-31.2 note
1328	1	15A-1431
1328	2	7A-271
1328	3	7A-228
1329	1	18A-69
1329	2	105-113.72
1329	3	18A-69 note
1330	1, 2	25A-15
1330	3	24-11
1332	1, 2	143-300.1

SESSION LAWS 1981

Ch.	Sec.	General Statutes
2	. .	105-37.1
3	. .	105-248
4	1	105-213
4	2	105-472
5	. .	105-56 Repealed
6	. .	105-87 Repealed
7	. .	105-48.1 Repealed
8	. .	17C-10
9	1, 2	9-6.1
10	. .	93-12
12	. .	50-10
13	. .	105-163.2
14	. .	105-164.13
15	. .	105-130.3
16	. .	105-53
17	. .	105-41
18	. .	105-54
18	. .	105-164.6
20	1, 2	130-153
21	1	157-33
21	2	157-34
23	. .	160A-353 L.M.
28	. .	105-277.1 note
30	. .	20-218
32	1, 2	163-106
32	3	163-294.2
33	1	163-59
33	2	163-67
33	3	163-69.1
33	4	163-74
33	5	163-288
33	6	163-288.2
35	1	163-210
35	2	163-188
36	. .	14-344
39	1	163-69
39	2	163-69 note
41	. .	130-17 L.M.
42	. .	20-7
44	. .	130-90
45	1	105-36.1
45	2, 3	105-37
46	1	105-142
46	2	105-144
46	3	105-142.1
46	4	105-142 note
47	1	113A-153
47	2	143-533
47	3	143B-374
47	4	143B-380
47	5	143B-407
47	6	143B-434
47	7	115D-2.1 note, 143-533 note, 143B-434 note
47	8	115D-2.1
48	. .	20-37.6A
50	1	143B-173
50	2	143B-174
50	3	131-2 Repealed, 131-3 Repealed
50	5	7A-289.14
50	6	134A-8
50	7	143B-207 Repealed, 143B-208 Repealed
51	1	143B-147, 143B-148, 143B-149, 143B-150
51	2	122-1.1A
51	3	122-1.2, 122-3, 122-4, 122-7.1, 122-7.2, 122-12, 122-13, 122-16.1, 122-35.26, 122-35.36, 122-35.37, 122-35.39, 122-35.41, 122-35.43, 122-35.45, 122-35.49, 122-35.50, 122-35.51, 122-35.52, 122-35.53, 122-35.57, 122-39, 122-69, 122-70, 122-72
51	4	122-35.36
51	5	20-179.2
51	6	148-19
51	7	143B-210 to 143B-212 Repealed
51	8	90-87
51	9	90-87, 90-88, 90-89, 90-90, 90-91, 90-92, 90-93, 90-94, 90-100, 90-101, 90-103, 90-104, 90-106, 90-109, 90-113.2
51	10	90-113.9
51	11	90-113.14
51	12	143-475.1
51	13	143B-182 Repealed, 143B-183 Repealed
51	16	143B-138
51	17	122-1.1 note
52	. .	122-35.40
53	1	153A-302, 160A-537
53	2	153A-303, 153A-304, 160A-538, 160A-539
53	3	160A-538 note, 160A-539 note
54	1	105-277.1
54	2, 3	105-282.1
54	4-6	105-309
54	7	105-282.1 note, 105-309 note
56	. .	105-130.17
59	. .	153A-241 L.M.
62	. .	14-271 L.M.
63	1	14-1.1 note, 14-2 note, 14-2.1 note, 14-3 note,

Ch.	Sec.	1981 General Statutes
63	1	14-7 note,
		14-7.1 note,
		14-8 note,
		14-9 note,
		14-12 note,
		14-12.1 note,
		14-12.15 note,
		14-13 note,
		14-14 note,
		14-17 note,
		14-18 note,
		14-19 note,
		14-20 note,
		14-28 note,
		14-29 note,
		14-30 note,
		14-30.1 note,
		14-31 note,
		14-32 note,
		14-34.1 note,
		14-34.2 note,
		14-39 note,
		14-41 note,
		14-42 note,
		14-43 note,
		14-44 note,
		14-45 note,
		14-46 note,
		14-49 note,
		14-49.1 note,
		14-50 note,
		14-52 note,
		14-53 note,
		14-54 note,
		14-55 note,
		14-56 note,
		14-56.1 note,
		14-56.3 note,
		14-57 note,
		14-58 note,
		14-58.2 note,
		14-59 note,
		14-60 note,
		14-61 note,
		14-62 note,
		14-62.1 note,
		14-63 note,
		14-64 note,
		14-65 note,
		14-66 note,
		14-67 note,
		14-67.1 note,
		14-72 note,
		14-72.2 note,
		14-74 note,
		14-75.1 note,
		14-79 note,
		14-87 note,
		14-88 note,
		14-89 note,
		14-89.1 note,
		14-90 note,
63	1	14-91 note,
		14-92 note,
		14-94 note,
		14-95 note,
		14-98 note,
		14-99 note,
		14-100 note,
		14-101 note,
		14-113.9 note,
		14-113.17 note,
		14-118.4 note,
		14-119 note,
		14-120 note,
		14-121 note,
		14-122 note,
		14-123 note,
		14-124 note,
		14-136 note,
		14-141 note,
		14-163 note,
		14-177 note,
		14-178 note,
		14-183 note,
		14-190.8 note,
		14-202.1 note,
		14-209 note,
		14-211 note,
		14-212 note,
		14-214 note,
		14-217 note,
		14-218 note,
		14-219 note,
		14-220 note,
		14-221 note,
		14-221.1 note,
		14-233 note,
		14-254 note,
		14-258 note,
		14-258.1 note,
		14-258.2 note,
		14-258.3 note,
		14-259 note,
		14-278 note,
		14-288.2 note,
		14-288.6 note,
		14-288.9 note,
		14-320.1 note,
		14-322.1 note,
		14-329 note,
		14-373 note,
		14-374 note,
		14-377 note,
		14-398 note,
		14-401.11 note,
		14-415.1 note,
		15A-1340.1,
		15A-1340.1 note,
		15A-1340.5 note,
		15A-1340.5, 15A-1340.6,
		15A-1340.5 note,
		15A-1340.6 note,
		15A-1371 note,

Ch.	Sec.	1981 General Statutes
63	1	90-95 note, 90-95.1 note, 90-98 note, 90-108 note
64	. .	131A-3
65	. .	105-164.6
66	1	160A-209
66	2	153A-149
67	. .	20-88
69	. .	29-14
71	. .	14-271 L.M.
72	. .	90-60
74	. .	20-97
75	1	90-87, 106-134.1
75	4	143-129 L.M.
76	1	105-368
76	2	105-368 note
77	. .	122-98.2
80	. .	105-141 note
81	1	130-82.2, 130-82.2 note
83	1, 2	105-33
83	3	105-37.1, 105-38, 105-39
83	4, 5	105-41
83	6	105-42
83	7	105-65.1
83	8, 9	105-83
84	. .	163-35
85	1	Ch. 120, Art. 14A
85	2	120-111.1
85	3	120-111.2
85	4	120-111.3
85	5	120-111.4
86	1	105-275
86	2	105-282.1
87	1	163-69
87	2	163-69 note
88	. .	14-413 L.M.
89	. .	143-129 L.M.
90	1	143-392 to 143-395 Repealed
90	2	143B-359 Repealed
91	4	116-33.1 note
92	. .	1A-1, Rule 14
93	1	90-95.2, 143B-480.1 note
93	2	160A-288
96	1, 2	28A-14-1.1
97	1	42-23
97	2	42-23 note
98	. .	20-143.1
99	. .	20-162 L.M., 20-162.1 L.M.
101	1	133-9
101	2	133-10
101	3, 4	133-10.1
101	5	133-9 note, 133-10 note, 133-10.1 note
102	1, 2	35-36
102	3	35-37
102	4	35-39
103	1, 2	14-234
103	3	14-236
103	4	14-237
103	5	14-234
104	. .	130-16
105	1	105-449.2
105	2	105-449.10
105	3	105-449.21
105	4	105-449.28 Repealed
106	1, 2	14-27.2
106	3, 4	14-27.4
108	. .	20-296
111	. .	118-1 L.M.
112	. .	153A-240
115	. .	160A-277 L.M.
116	. .	143-129 L.M.
117	1	14-284 L.M.
117	2	14-410 L.M., 14-413 L.M.
124	. .	163-171
129	. .	20-97
130	1	130-3
130	2	130-17
130	3	130-23.1 to 130-23.4 Repealed
131	. .	111-15
134	1, 2	130-130 L.M.
135	. .	103-4
137	. .	160A-266 L.M.
138	1	47-30, 47-32, 47-32.2
138	2	47-30 note, 47-32 note, 47-32.2 note
140	1	47-30, 47-32, 47-32.2
140	2	47-30 note, 47-32 note, 47-32.2 note
142	1	7A-180
145	1	20-26
145	2	20-27
146	1	14-122.1
146	2	14-122.1 note
148	1	74C-4
148	2	74C-4 note
152	. .	163-174
153	. .	163-173
154	. .	163-33.1
155	1	163-232
155	2	163-251
155	3	163-227
157	1	115D-45 to 115D-53 Recodified, 115D-54 to 115D-58.12
157	2	115D-31
157	3	115D-32
157	4	115D-39
157	5	115D-26
160	1	96-4

1981		
Ch.	Sec.	General Statutes
160	2	96-5
160	3-12	96-8
160	13-15	96-9
160	16	96-10
160	17-23	96-12
160	24, 25	96-13
160	26	96-14
160	27-32	96-15
160	33	96-18
161	. .	75A-5
162	. .	75A-7
164	1	10-12
164	2	10-16.1
164	3, 4	10-12, 10-16.1 note
166	. .	153-295
169	1	20-116
174	. .	160A-266 L.M.
176	. .	160A-266 L.M.
179	1-5	15A-1340.4
179	6	15A-1414
179	7	15A-1415
179	8, 9	15A-1444
179	10	14-7.1 note
179	11	14-7.2
179	12	14-7.4
179	13	14-7.6
179	14	14-1.1 note, 14-2 note, 14-2.1 note, 14-3 note, 14-7 note, 14-8 note, 14-9 note, 14-12 note, 14-12.1 note, 14-12.15 note, 14-13 note, 14-14 note, 14-17 note, 14-18 note, 14-19 note, 14-20 note, 14-28 note, 14-29 note, 14-30 note, 14-30.1 note, 14-31 note, 14-32 note, 14-34.1 note, 14-34.2 note, 14-39 note, 14-41 note, 14-42 note, 14-43 note, 14-44 note, 14-45 note, 14-46 note, 14-49 note, 14-49.1 note, 14-50 note, 14-52 note, 14-53 note, 14-54 note, 14-55 note, 14-56 note, 14-56.1 note, 14-56.3 note, 14-57 note, 14-58 note, 14-58.2 note, 14-59 note, 14-60 note, 14-61 note, 14-62 note, 14-62.1 note, 14-63 note, 14-64 note, 14-65 note, 14-66 note, 14-67 note, 14-67.1 note, 14-72 note, 14-72.2 note, 14-74 note, 14-75.1 note, 14-79 note, 14-87 note, 14-88 note, 14-89 note, 14-89.1 note, 14-90 note, 14-91 note, 14-92 note, 14-94 note, 14-95 note, 14-98 note, 14-99 note,
179	14	14-100 note, 14-101 note, 14-113.9 note, 14-113.17 note, 14-118.4 note, 14-119 note, 14-120 note, 14-121 note, 14-122 note, 14-123 note, 14-124 note, 14-136 note, 14-141 note, 14-163 note, 14-177 note, 14-178 note, 14-183 note, 14-190.8 note, 14-202.1 note, 14-209 note, 14-211 note, 14-212 note, 14-214 note, 14-217 note, 14-218 note, 14-219 note, 14-220 note, 14-221 note, 14-221.1 note, 14-233 note, 14-254 note, 14-258 note, 14-258.1 note, 14-258.2 note, 14-258.3 note, 14-259 note, 14-278 note, 14-288.2 note, 14-288.6 note, 14-288.9 note, 14-320.1 note, 14-322.1 note, 14-329 note, 14-373 note, 14-374 note, 14-377 note, 14-398 note, 14-401.11 note, 14-415.1 note, 15A-1340.1, 15A-1340.1 note, 15A-1340.5, 15A-1340.5 note, 15A-1340.6 note, 15A-1371, 90-95 note, 90-95.1 note, 90-98 note, 90-108 note
180	. .	14-33
181	1	106-568.2, 106-568.8
182	. .	50-6
183	1	45-20.1
183	2	45-20.2 Repealed
183	3	45-20.1 note, 45-20.2 note
184	. .	163-57
185	. .	162A-35
186	1	130-126
186	2	130-127
186	3	130-145
186	4	130-147
186	5	130-148
186	6	130-149
186	7	130-156.2
187	1	130-46
187	2-4	130-197
187	5, 6	130-199
187	7	130-200
187	8	130-202
188	1, 2	130-211
189	1	131-4
189	2	131-5
189	3	131-7
189	4	131-39
190	. .	50-11
191	1	47-71.1
191	2	47-71.1 note
193	1	62-67 Repealed

Ch.	Sec.	1981 General Statutes
193	2	62-79
193	3	62-81
193	4	62-262
196	. .	7A-109 note, 14-402 note, 14-409.1 note
197	. .	130-275
199	. .	162-3 L.M., 162-5 L.M.
200	1, 2	136-28.1
201	. .	130-126.1
203	1	14-419
203	2	14-420
207	. .	105-164.13
209	. .	118-1 L.M.
210	. .	20-97
215	. .	121-8
216	1	106-557
216	2	106-559.1
216	3	106-563.1
216	4	106-567.1
217	. .	69-25.4
218	. .	9-113.3
219	1-3	163-96
219	4	163-74
220	1, 2	163-110
221	. .	163-35
222	. .	163-72
224	. .	105-317
225	. .	163-278.13
226	. .	130-166.54
227	. .	20-64
228	. .	20-97
229	. .	53A-6
230	. .	89C-14
238	. .	130-14
239	. .	20-162.1 L.M.
240	. .	20-81
242	1	97-86.2
242	2	97-86.2 note
243	. .	131-126.38B
245	1	146-24
245	2	136-107
247	1	Ch. 113A, Art. 4 note, 143-34.12 note
248	1, 2	143B-299
248	3	143-34.12 note
249	2	113-133.1
250	2	113-133.1
251	1	139-41.1
251	2	153A-440.1
252	1	113-140
252	2	113-140 note
256	. .	153A-139 note
260	. .	148-52.1
267	. .	8-59
268	1	14-249 Repealed
268	2	143-60
270	. .	130-130 L.M., 160A-266 L.M.
274	. .	50-16.1
275	1	108-7 to 108-24.1 Repealed, 108-38 to 108-54.1 Repealed, 108-56 to 108-61 Repealed, 108-61.8 to 108-66 Repealed, 108-75.1 to 108-75.25 Recodified, 108-102 to 108-110 Repealed, 108A-1 to 108A-18, 108A-24 to 108A-64, 108A-71 to 108A-73, 108A-79 to 108A-80, 108A-86 to 108A-92, 108A-99 to 108A-111
275	2	108-76 to 108-78 Recodified as 131D-1 to 131D-5, 131D-1, 131D-2, 131D-5, 131D-11 to 131D-13, 108-79 to 108-81 Recodified as 131D-11 to 131D-13
275	3	108-116 to 108-123 Recodified as 143B-344.3 to 143B-344.10, 143B-344.3, 143B-344.4, 143B-344.5, 143B-344.6, 143B-344.7, 143B-344.8, 143B-344.9, 143B-344.10
275	4	48-39 to 48-39.2 Repealed
275	5	143B-153
275	6	48-38
275	7	110-136.1
275	8	110-132
275	9	48-38 note, 108-7 to 108-24.1 note, 108-38 to 108-54.1 note, 108-56 to 108-61 note, 108-61.2 to 108-66 note, 108-75.1 to 108-75.81 note, 108-102 to 108-110 note, 108-116 to 108-123 note, 108A-1 note, 131D-1 note, 131D-19 note
275	10	108-7 to 108-24.1 note, 108-38 to 108-54.1 note, 108-56 to 108-61 note, 108-61.2 to 108-66 note, 108-75.1 to 108-75.81 note, 108-102 to 108-110 note, 108-116 to 108-123 note, 108A-1 note, 131D-1 note, 131D-11 note
275	11	108A-1 note, 110-136.1 note
276	1	97-30, 97-38, 97-61.5, 97-61.6
276	2	97-29

Ch.	Sec.	1981 General Statutes
278	1	143-177.3
278	2	143B-335
279	. .	14-269.1 note
281	. .	130-17
282	1	54-1 to 54-44.14 Repealed
282	2	54A-1 to 54A-27 Repealed
282	3	24-1.4, 54B-1 to 54B-25, 54B-30 to 54B-43, 54B-52 to 54B-77, 54B-100 to 54B-109, 54B-121 to 54B-136, 54B-150 to 54B-167, 54B-180 to 54B-195, 54B-197, 54B-210, 54B-211, 54B-216, 54B-221 to 54B-228, 54B-236 to 54B-249, 54B-261, 54B-262
283	. .	130-130 L.M., 160A-266 L.M.
284	1	106-81 to 106-92 Repealed, 106-159 to 106-168 Repealed, 106-549.1 to 106-549.14 Repealed
285	. .	118-1 L.M.
286	. .	118-1 L.M.
288	. .	118-1 L.M.
293	. .	153A-345 L.M.
294	. .	118-1 L.M.
298	. .	118-1 L.M.
300	. .	143-341
301	. .	140-5.14
302	. .	147-59 to 147-61 Repealed
303	. .	163-33.2
304	. .	163-175
305	1	163-227
305	2	163-227.2
305	3	163-230
305	4	163-232
306	. .	58-79
307	2, 3	148-22.2
307	8	130-191 transferred to 148-22.2, 148-22.2 note
307	4-7	148-46.2
307	9	130-191.1 transferred to 148-46.2, 148-46.2, 148-46.2 note
308	1	163-69
308	2	163-72
308	3	163-251
309	. .	147-22 Repealed
310	. .	20-97
311	. .	20-97
312	. .	20-97
313	1	7A-308
313	2	7A-308 note
314	. .	20-162.1 L.M.
315	. .	20-97, 20-97 note
318	. .	160A-238 L.M.
326	1	139-4
326	2	139-26
326	3	139-35
326	5	139-41
326	6	139-41.2
326	7	139-44
326	8	139-47
326	9	139-53
327	1	24-5
327	2	24-7
327	3	24-5 note, 24-7 note
328	1, 2	122-55.6
329	1	1-42.5
329	2	1-42.3
330	. .	139-7
331	. .	18B-700 L.M.
332	1	87-21
332	2	87-22
333	1, 2	1-42.6
335	1, 2	7A-572
336	1	7A-517
337	. .	106-407.1
338	. .	106-267
339	. .	97-59
340	1-4	130-3
341	. .	118-1 L.M.
343	. .	122A-8
344	1	122A-3
344	2	122A-5.5
345	1	130-180 to 130-186 Repealed, 130-186.2 Repealed
345	2	130-186.15 to 130-186.24
345	3	130-186.15 note
346	1	143-129
346	2	143-129 note
347	1	153A-93
347	2	160A-163
348	1	143-166.13
348	2	143-166.18
348	3	143-166.19
348	4	143-166.20
351	1	113-36
353	1, 2	130-166.49
354	1	96-3
355	. .	135-37
357	1	58-155.71
357	2, 3	58-155.73
358	. .	39-28 Repealed, 39-29 Repealed, 39-30 note, 39-31 Repealed, 39-32 Repealed
359	1	7A-542
359	2	7A-517
360	1	90-158 to 90-171.18 recodified as 90-171.19 to 90-171.47, 90-171.19 to 90-171.47
360	2	90-171.21 note
360	3	90-171.19 note

Ch.	Sec.	1981 General Statutes
360	4	143-34.12 note
360	5	90-171.19 note
361	1-4	90A-42
362	1, 2	47-17.1
364	. .	160A-388 L.M.
367	. .	160A-388 L.M.
368	. .	20-97
369	1	7A-304
370	10	20-97
371	1	7A-641
371	2	7A-641 note
372	. .	55A-35
373	. .	14-399 L.M.
376	1	106-549.17
376	2	106-549.23
377	1	15A-1332
377	2, 3	15A-1341
377	4-6	15A-1342
377	7	15A-1344
378	1	97-13, 97-29, 97-38, 97-61.5
379	. .	97-38, 97-40
380	1	143B-438 Repealed
381	1	6-21.4
383	1, 2	28A-19-6
383	3	28A-25-6
384	1, 2	1A-1, Rule 36
384	3	1A-1, Rule 4
387	1, 2	105-289
390	. .	20-130.2
392	. .	106-405.2
393	. .	104C-4 to 104C-5 note, Ch. 104E note
394	1	58-59
394	2	58-59.5
397	. .	153A-27 L.M.
400	. .	17C-10
401	. .	160A-299
402	1, 2	160A-299
406	1, 2	121-5
407	. .	118-7 L.M.
408	. .	130-14
409	1	15A-603
409	2	7A-450
410	. .	113-291.1 L.M.
412	1	18A-1 to 18A-69 Repealed
412	2	18B-100 to 18B-110, 18B-200 to 18B-207, 18B-300 to 18B-308, 18B-400 to 18B-406, 18B-500 to 18B-505, 18B-600 to 18B-605, 18B-700 to 18B-703, 18B-800 to 18B-807, 18B-900 to 18B-906, 18B-1000 to 18B-1008, 18B-1100 to 18B-1111, 18B-1115 to 18B-1117
412	3	95-25.5
412	4	14-258.1, 14-269,

Ch.	Sec.	1981 General Statutes
412	4	14-269.3, 14-443, 20-12.1, 20-16.2, 20-16.3, 20-17, 20-19, 20-23.2, 20-26, 20-28, 20-28.1, 20-138, 20-139.1, 20-140, 20-168, 20-179.1, 90-65, 95-25.5, 122-7.1, 122-58.22, 143A-243, 143B-433, 153A-135 note
412	5	143B-433, 153A-135 note
413	1	30-15
413	2	30-17
413	3	30-26
413	4	30-29
414	1	1-538.1
414	2	1-538.1 note
415	10	20-97
416	. .	20-24
419	1-3	108A-79
419	4	108A-80
420	1-3	108A-79
421	1, 2	97-2
421	3	97-29
423	1	115-1 to 115-410 Repealed, 115C-1 to 115C-5, 115C-10 to 115C-12, 115C-18 to 115C-21, 115C-27 to 115C-29, 115C-35 to 115C-48, 115C-54 to 115C-59, 115C-65 to 115C-75, 115C-81 to 115C-105, 115C-106 to 115C-128, 115C-130 to 115C-140, 115C-141 to 115C-145, 115C-151 to 115C-169, 115C-175 to 115C-184, 115C-189 to 115C-197, 115C-203 to 115C-209, 115C-215, 115C-216, 115C-222 to 115C-224, 115C-230 to 115C-233, 115C-239 to 115C-265, 115C-271 to 115C-278, 115C-284 to 115C-289, 115C-295 to 115C-309, 115C-315 to 115C-317, 115C-323 to 115C-330, 115C-336 to 115C-343, 115C-349 to 115C-358, 115C-364 to 115C-366, 115C-367 to 115C-372, 115C-378 to 115C-384, 115C-390 to 115C-392, 115C-398 to 115C-402, 115C-408 to 115C-416, 115C-422 to 115C-452, 115C-458 to 115C-467, 115C-473 to 115C-475, 115C-481 to 115C-484, 115C-490 to 115C-494,

Ch.	Sec.	1981 General Statutes
423	1	115C-500 to 115C-511, 115C-517 to 115C-527, 115C-533 to 115C-542, 115C-547 to 115C-562, 115C-568 to 115C-578
424	1	113-276.3
424	2	113-277
424	3	113-276.3 note, 113-277 note
425	1	7A-573
426	1-4	7A-574
427	. .	Ch. 89A note
428	1	28A-8-1
429	. .	20-187.3
430	1	9-2
430	2	9-6
430	3	9-2.1
430	4, 5	9-6.1
432	1	14-276.1
432	2	14-276.1 note
434	. .	163-112
435	1	147-50
436	1	113-291.6 L.M.
437	. .	160A-274 L.M.
439	1	62-81
440	1	15A-622
442	. .	122-58.21
444	1	7A-250
445	1-3	159-30
445	4, 5	147-69.3
446	1-3	25A-15
447	2	159-31
448	1-4	106-657
448	5, 6	106-660
448	7	106-661
448	8	106-662
448	9	106-663
448	10	106-669
448	11	106-677
449	1	106-92.17
449	2	106-92.3
449	3	106-92.17 note
450	1	105-228.22 to 105-228.27
450	2	105-130.11
450	3	105-130.11 note, 105-228.22 note
451	1	8-97
451	2	8-97 note
452	. .	78A-28
453	1	143-345.6 note
454	1	7A-596
454	2	7A-597
455	1	7A-4.20
455	2	7A-39.13
455	3	7A-39.3, 7A-39.3 note
455	4	7A-57
455	5	7A-53.1
455	6	7A-52, 7A-52 note
457	1	86A-3
457	2	86A-4
457	3, 4	86A-5
457	5	86A-10
457	6, 7	86A-11
457	8	86A-12
457	9	86A-18
457	10	86A-20
457	11	86A-17
457	12	86A-22
457	13	86A-23
457	14	86A-24
457	15	Ch. 86A note, 143-34.12
458	1	153A-132.1 note
458	2	153A-122 note, 153A-132.1 note, 153A-136 note
458	4	153A-299.6
459	. .	130-130 L.M., 160A-266 L.M.
460	1	62-136
460	2	62-136 note
461	1	62-130
461	2	62-135
461	3	24-9.1
462	1	112-1 Repealed, 112-3 Repealed
462	2, 3	112-1 note
462	5	143B-173
462	6	143B-174
462	7-11	112-1 note
463	1	130-167
463	2	130-168 Repealed
463	3	130-169
464	1	24-1.2
464	2	53-172
464	3	53-180
464	4	24-14
464	5	24-1.2 note, 24-14 note, 53-172 note, 53-180 note
465	1	24-1.1
465	2	24-1.1D
465	3	24-1.1D note
466	1-3	20-179.2
466	4-6	20-179
466	7	20-140
467	1-5	143B-478
468	. .	28A-18-2
469	1-3	7A-517
469	4	7A-524
469	5	7A-532
469	6	7A-536
469	7	7A-547
469	8	7A-550
469	9	7A-560
469	10, 11	7A-561
469	12	7A-630
469	13	7A-577
469	14	7A-587
469	15, 16	7A-609
469	17	7A-634

Ch.	Sec.	1981 General Statutes
469	18	7A-640
469	19	7A-647
469	20	7A-649
469	21	7A-289.2
469	22	7A-289.6
469	23	7A-289.25
469	24	8-53.1
470	1	7A-28
470	2	7A-31
470	3	15A-1422
470	4	7A-31 note, 15A-1422 note
471	. .	116-143.1
472	. .	50-13.4
473	1	50-11.3
474	. .	115D-2.1
475	1	62-15
476	1	62-133
477	2	143-129 L.M.
478	. .	117-13
479	. .	47-30
480	1	104E-10.2
480	2	104E-23
480	3	130-166.21
480	4	130-166.21E
480	5	104E-10.2 note
481	1	136-89.56
482	1	143-250.1
482	2	143-250
482	3	113-306
482	4	113-270.2
482	5	113-271
482	6	113-272
482	7	113-270.3
482	8	113-272.3
485	1	7A-21
486	1	119-48 to 119-53 recodified as 119-54 to 119-59, 119-54 to 119-59
486	2	119-56 note
487	. .	159B-27
488	1	66-57.1, 66-57.2
489	1-7	95-25.5
490	1	1C-1601 to 1C-1604
490	2	1-369 to 1-392 Repealed
490	3	1C-1601 note
491	1	122-98
491	2	122-98 note
492	. .	35-1.16
493	1	95-25.3
493	2	95-25.14
494	1-4	50-12
495	1	81A-10
495	2	106-65.31
495	3	106-65.29
495	4	106-503
495	5	106-267
495	6	106-277.15
495	7	106-405.17
495	8	106-396
495	9	106-22
495	10	106-6.1
496	1	90-116
496	2	90-117.1
496	3	90-117.3
496	4, 5	90-118
496	6, 7	90-118.5
496	8	90-118.8
496	9	90-118.9
496	10	90-118.11
496	11	90-121.1
496	12, 13	90-121.2
496	14	90-127.3
496	15	Ch. 90, Art. 6 note, 143-34.12 note
496	16	90-127.3 note
497	1, 2	115C-116
498	1	143B-376
499	1	114-20.1
499	2	14-132
500	1	90-113.20 to 90-113.24
500	2	90-113.4 Repealed
500	3, 4	90-113.4 note, 90-113.20 note
501	. .	105-278
502	1, 2	129-42
503	1	58-262.13 to 58-262.20
503	2	58-262.13 note
504	1	7A-140 note, 163-8 note
504	2	7A-140 note, 163-8 note
504	3	7A-140 note, 163-8 note
504	4	7A-140 note, 147-4 note, 152-1 note, 161-1 note, 162-1 note, 163-1 note, 163-8 note, 163-9 note, 163-10 note, 163-11 note, 163-12 note
504	6	7A-140
504	7	147-4, 147-4 note
504	8	152-1, 152-1 note
504	9	161-1, 161-1 note
504	10	162-1, 162-1 note
504	11-13	163-1, 163-1 note
504	14	163-8, 163-8 note
504	15	163-9, 163-9 note
504	16	163-10, 163-10 note
504	17	163-11, 163-11 note
504	18	163-12, 163-12 note
504	19	163-8 note
504	20	7A-140 note, 147-4 note, 152-1 note, 161-1 note, 162-1 note, 163-1 note, 163-8 note, 163-9 note, 163-10 note, 163-11 note, 163-12 note
507	1	41-2.5
507	2	41-2.5 note
508	. .	20-4.18
509	. .	105-322 L.M.
510	. .	160A-267 L.M.
511	. .	143-135 L.M.

Ch.	Sec.	1981 General Statutes
512	. .	54-109.105
514	1	143-215.6
514	2, 3	143-355
515	1	163-128
516	1	148-26
517	1	8-22.1
518	. .	153A-240
519	1	14-445
519	2	14-447
519	3, 4	122-58.22
519	5	122-65.11
520	1	143B-13
520	2	143B-16
521	1	58-124.20
521	2	97-29
521	3	97-31.1
521	4	97-90
521	5	58-124.19
522	. .	153A-229
523	1	143B-126
523	2	143B-127
525	1	131-94
525	2	131-94.1
525	3	131-94 note, 131-94.1 note
526	1	7A-574
527	1	47A-14 Repealed
527	2, 3	47A-14.1
527	4	47A-14.1 note
528	1	7A-586
529	. .	116-36.1
530	1, 2	15A-1343
531	1	116B-3
531	2	116B-10
531	3	116B-14
531	4-6	116B-28
531	7, 8	116B-29
531	9-13	116B-30
531	14	116B-31
531	15	116B-46
531	16	20-279.10
531	17	62-209
532	. .	118-1 L.M.
533	. .	118-1 L.M.
534	. .	96-9
535	1	14-34.2
536	. .	136-44.8
537	1	122-58.8
537	2-4	122-58.11
537	5	122-58.13
537	6	122-58.7A
538	1-3	115C-325
539	1	122-35.36
539	2	122-35.40B, 122-35.40C
539	3	122-35.49
539	4	122-35.40D, 122-35.49
539	5	122-35.40B note, 122-35.40C note, 122-35.40D note
540	1-8	1A-1, Rule 4
540	9, 10	1-75.10
541	1-3	148-33.1
541	4-9	148-33.2
541	10	148-33.1 note, 148-33.2 note
542	1	163-75
542	2	163-76
543	1-3	8-58.12 to 8-58.14
543	4	8-58.12 note
544	1	131D-2
545	1, 2	136-89.59
546	. .	36A-53
547	. .	143-443
549	1	20-129
550	1	58-180.3
550	2, 3	58-180.3 note
552	1	106-707 to 106-714
553	. .	143B-143
554	. .	130-63
555	1	7A-210
555	2	7A-219
555	3	7A-273
555	4	42-28
555	5	42-30
555	6	7A-305
556	. .	163-22
557	1, 2	128-21, 135-1
557	3	128-26, 135-4
558	. .	153A-240 L.M.
559	1	163-154 Repealed
560	1	163-227.1
560	2	105-465, 105-473
560	3	139-6
561	1-3	53-173
561	4	53-175
561	5, 6	53-179
561	7	53-176
561	8	53-184
561	9	53-173 note, 53-175 note, 53-176 note, 53-179 note, 53-184 note
562	1	90A-27
562	2	97-72
562	3	115C-126.1
562	4	130-11
562	5	130-200
562	6	143-117, 143-118
562	7	143B-153
562	8	143-546
562	9	130-166.55
562	10	90A-27 note, 97-72 note, 130-11 note, 130-166.55 note, 130-200 note, 143-117 note,

Ch.	Sec.	1981 General Statutes
562	10	143-118 note, 143-546 note, 153A-149 note, 153A-255 L.M.
562	11	153A-149
562	12	153A-255
562	13	130-166.55 note
563	1	143B-426.2, 143B-426.3, 143B-426.4, 143B-426.5, 143B-426.6, 143B-426.7, 143B-426.7A,
564	1	163-178 Repealed
564	2	101-8
565	1	168-20, 168-21, 168-22, 168-23
566	1	42-25.6 to 42-25.9
566	2	44A-2
566	3	42-25.6 note
567	1	115C-366
567	2-4	115-366.1
568	. .	153A-239 L.M., 153A-240 L.M.
569	. .	58-155.72
571	. .	15A-1355
572	1, 2	90-294
572	3	90-296
572	4	90-301
572	5, 6	90-303
572	7	90-304
572	8	Ch. 90, Art. 22 note, 143-34.13 note
573	1	90-1
573	2	90-2
573	3	90-3
573	4	90-4
573	5	90-5
573	6	90-9
573	7	90-11
573	8	90-12
573	9, 10	90-14
573	11	90-14.4
573	12	90-14.8
573	13	90-14.12
573	14	90-14.13
573	15	90-15
573	16	90-21
573	17	Ch. 90, Art. 1 note, 143-34.12 note
574	1	20-162
575	1	113-272.5
576	1	115C-257, 115C-258, 115C-259
576	2	115C-260 Repealed, 115C-261 Repealed
577	. .	143-135.3
580	. .	105-374
582	. .	160A-514 L.M.
583	. .	153A-345 L.M.
584	1	46-3.1
584	2	1-502
584	3	1-502 note, 46-3.1 note
585	1-4	143-215.13
585	5	143-215.14
585	6-10	143-215.15
585	11	143-215.17
585	12	143-215.19
585	13	143-215.6
586	1	130-9
586	2	130-170.1
586	3	131-126.9
586	4	131-126.12
586	5	131B-7
586	6	153A-222
587	. .	47A-15
589	. .	18B-603
590	1	58-248.34
591	. .	95-69.10
592	1	143-440
592	2	143-442
592	3, 4	143-443
592	5	143-447
592	6	143-448, 143-452
592	7	143-452
592	8	143-457 Repealed
592	9-11	143-460
592	12	143-469
592	13	143-470 Repealed
593	. .	96-14
594	1	66-131 to 66-136
594	2	66-131 note
595	. .	160A-489 L.M.
596	. .	69-25.1 L.M., 69-25.4 L.M.
599	1	1A-1, Rule 17
599	2	1A-1, Rule 32
599	3	7A-228
599	3	7A-230
599	4	20-154
599	5, 6	28A-8-1
599	7	30-17
599	8	31-11.6
599	9	31-11.6 note
599	10, 11	39-13.4
599	12	45-13 Repealed
599	13	49-5
599	14	49-14
599	15	50-8
599	16	52-8
599	17	53-43.5
599	18	53-53 Repealed
599	19	25-4-406, 53-52 Repealed, 53-76
599	20	164-13
599	21	1A-1, Rule 17, note, 1A-1, Rule 32, note, 7A-228 note, 7A-230 note, 20-154 note, 25-4-406 note, 28A-8-1 note, 30-17 note, 31-11.6 note, 39-13.4 note,

Ch.	Sec.	1981 General Statutes
599	21	45-13 note, 49-5 note, 49-14 note, 50-8 note, 52-8 note, 53-43.5 note, 53-52 note, 53-53 note, 53-76 note, 164-13 L.M.
600	1	90-236.1
600	2	90-237
600	3	90-238
600	4-7	90-239
600	8	90-240
600	9	90-241
600	10	90-242 Repealed
600	11	90-243
600	12	90-244
600	13	90-246
600	14	90-247 Repealed
600	15	90-248
600	16	90-249
600	17	90-252
600	18	90-253
600	19	90-254
600	20	90-255
600	21	Ch. 90, Art. 17 note, 143-34.12 note
601	1	93D-2
601	2-5	93D-3
601	6	93D-4
601	7, 8	93D-5
601	9	93D-8
601	10-15	93D-9
601	16	93D-10
601	17	93D-11
601	18	93D-12
601	19	93D-13
601	20	93D-15
601	21	Ch. 93D note, 143-34.13 note
602	1	143-51
602	2, 3	143-52
602	4	143-53
604	. .	143-63.1
605	1	143B-480
606	1	136-44.21 to 136-44.26
606	2	95-25.14
606	3	20-4.01
606	4	105-141
606	5	160A-304
607	1	81A-29
607	2	81A-37 to 81A-40 Repealed, 81A-43 Repealed, 81A-50 Repealed, 81A-56 Repealed, 81A-57 Repealed, 81A-60 Repealed, 81A-62 to 81A-64 Repealed
607	3	81A-50.1
607	4	81A-51 to 81A-55
607	5	81A-58, 81A-59
607	6	81A-61
609	. .	115D-5
610	1	66-142 to 66-146
610	2	66-142 note
611	1	90-270.53
611	2	90-270.54
612	1	115D-58.6, 115D-58.7
613	1	50-13.4
613	2	50-13.4 note, 110-138.1 note
613	3	50-13.4
613	4	110-138.1
614	1	88-23
614	2	88-28
614	3	88-28.1
614	4	122-16 Repealed, 122-16.1 Repealed
614	5	143-116.6, 143-116.7
614	6	122-96
614	7	122-35.41
614	8	130-9
614	9	143B-142
614	10	143B-165
614	11	130-24 Repealed, 130-24.1, 130-25 Repealed, 130-26 Repealed
614	12	130-108
614	13	130-110
614	14	130-112
614	15	130-201
614	16	131-126.6
614	17	131-126.14
614	18	134A-8
614	19	143B-181.1
614	20, 21	153A-223
614	22	150A-1
614	23	130-24.1 note, 143-116.6 note, 143-116.7 note
615	1, 2	88-1
615	3	88-4
615	4	88-6
615	5	88-7 Repealed
615	6	88-7.1
615	7	88-9
615	8	88-10
615	9	88-12
615	10	88-13
615	11	88-15
615	12	88-19
615	13	88-21
615	14	88-23
615	15	88-26
615	17	88-28
615	18	88-28.1
615	19	88-30
615	20	Ch. 88 note, 143-34.12 note
616	1-5	90A-21
616	6	90A-22
616	7, 8	90A-25
616	9	90A-26

Ch.	Sec.	1981 General Statutes
616	10	90A-29
616	11	90A-30
616	12	Ch. 90A, Art. 2 note, 143-34.12 note
619	1-4	90-210.25
619	5	90-210.28
620	1	113-270.3
620	2	113-272.2
620	3	113-272.3
620	4-6	113-273
620	7, 8	113-275
623	1, 2	105-312
623	3	105-312 note
624	1	78A-16
624	2	78A-17
624	3	78A-28
624	4	78A-36
624	5	78A-40
624	6	78A-26
625	..	108A-2 L.M.
626	1-10	15A-701
626	11	15A-703
626	12	15A-703 note
627	..	40-1 note
628	1, 2	163-41
629	..	130-128
630	..	163-162
632	..	160A-457 L.M.
633	1	66-76
633	2-4	66-77
633	5	66-78, 66-79
633	6	66-80
633	7	66-81
633	8	66-84 Repealed
634	1	8-57.2
634	2	8-57.2 note
635	2	115C-123
635	3	66-58
635	4	122-16
635	5	122-33
636	1	135-4, 135-4 note, 135-8, 135-8 note
637	..	163-122
638	1	115C-521
639	1	115C-302
639	2, 3	115C-316
639	4	115C-285
640	2	44-69.2, 44-69.2 note
641	..	160A-460
642	..	15A-1372
644	1	1-50
644	2	1-50 note
645	1, 2	163-111
646	..	14-269.4
651	1	131-175, 131-176, 131-177
651	2	131-176
651	3	131-178
651	4	131-178.1, 131-178.2
651	5	131-179
651	6	131-180
651	7	131-181
651	8	131-181.1
651	9, 10	131-182
651	11	131-185
651	12	131-186
651	13	131-187
651	14	131-175 note, 131-176 note, 131-177 note, 131-178 note, 131-178.1 note, 131-178.2 note, 131-179 note, 131-180 note, 131-181 note, 131-181.1 note, 131-182 note, 131-185 note, 131-186 note, 131-187 note
652	1	15A-2000
652	2	15A-2000 note
653	1	105-147
654	1, 2	90-270.4
655	..	130-128
656	..	163-66
657	..	48-36
658	1	113A-1 note
659	1	90-202.4
659	2	90-202.5
659	3, 4	90-202.6
659	5	90-202.7
659	6-8	90-202.8
659	9	90-202.13
659	10	131-126.11A, 131-126.11B
659	11	Ch. 90, Art. 12A note, 143-34.12 note
660	1	119-60
660	2	119-60 note
661	..	90-171.27
662	1	14-17
662	2	14-1.1
662	3	15A-1370.1
662	4	15A-1380.1
662	5	15A-1380.2
662	6	148-49.15
662	7	15A-1340.7
662	8, 9	148-13
663	1	95-25.7
663	2	95-25.8
663	3	95-25.9
663	4	95-25.10
663	5	95-25.11
663	6	95-25.12
663	7	95-25.14
663	8	95-25.20
663	9	95-25.23
663	10, 11	95-25.2
663	12	95-25.13
663	13	95-25.3
663	14	136-44.25
664	2	14-81
665	1	90-6

Ch.	Sec.	1981 General Statutes
665	2	90-171.23
667	1, 2	130-9.7
667	3	130-9.7 note
669	. .	105-113.86
670	1	54B-35
670	2	54B-44
670	3	54B-35 note, 54B-44 note
671	1	53-12
671	2	53-13
671	3-6	53-42.1
671	7	53-43
671	8	53-43.3
671	9	53-50
671	10	53-51
671	11	53-75
671	12	53-106
671	13	53-122
671	14	53-145
671	15	53-168
671	16, 17	65-36.5
671	18	116B-39
672	1	135-5
672	2	128-27
672	3	143-166
672	4	135-62
672	5	128-27 note, 135-5 note, 135-62 note, 143-166
673	1, 2	20-37.7
674	. .	51-9
675	1	143B-181.5, 143B-181.6, 143B-181.7, 143B-181.8, 143B-181.9
675	2	143B-181.6
676	2	130-187
676	3	90-172
676	4	130-112
676	5	130-187 note
676	6	90-172 note, 130-112 note, 130-187 note
677	1	160A-417
677	2	153A-357
677	3	143-138
678	1	105-317
679	1	108A-65
679	2	108A-65 note
680	1	126-37
680	2	126-37 note
681	1	113-291.2
682	1	7A-246
682	2	11-7.1
682	3, 4	14-190.2
682	5	15-166
682	7	20-37.6
682	8	28C-5
682	9	44A-2
682	10	45-21.31
682	11	47B-2
682	12	50-13.7
682	13	55A-57
682	14	78A-28
682	15	93A-6
682	16	105-130.22
682	17	105-151.1
682	18	105-199
682	19	136-18
682	20, 21	160A-50
682	22	6-21.4
682	23	115C-444
683	1	14-322
683	2	14-325.1
683	3	14-323 to 14-325 Repealed, 14-326 Repealed
684	1	14-277.2
684	2	14-277.2 note
685	1	159-7
685	2	159-8
685	3-5, 10	159-13
685	6, 7	159-26
685	8, 9	159-34
686	1	14-5.2
686	2	14-5 Repealed, 14-5.1 Repealed, 14-6 Repealed
686	3, 4	14-5 note, 14-5.1 note, 14-5.2 note, 14-6 note
687	. .	133-1.1
688	1	120-30.24
688	2	120-30.17
688	3	120-30.25
688	4	120-30.26
688	5	120-30.27
688	6	120-30.28
688	7	120-30.29A
688	8	120-30.29 Repealed, 120-30.30 Repealed, 120-30.31 Repealed, 120-30.33 Repealed
688	9, 10	120-30.35
688	11	120-30.36
688	12	150A-13
688	13	150A-59
688	14	150A-60
688	15	150A-63.1
688	16	120-30.26 note
688	17	120-30.28 note
688	18	120-30.11 note, 120-30.17 note, 120-30.24 note, 150A-2 note, 150A-12 note, 150A-58 note
688	19	120-30.11
688	20	143B-14
688	21	120-30.11 note, 120-30.17 note, 120-30.24 note, 120-30.25 note,

Ch.	Sec.	1981 General Statutes
688	21	120-30.26 note,
		120-30.27 note,
		120-30.28 note,
		120-30.29 note,
		120-30.29A note,
		120-30.30 note,
		120-30.31 note,
		120-30.33 note,
		120-30.35 note,
		120-30.36 note,
		150A-13 note,
		150A-59 note,
		150A-60 note,
		150A-63.1 note
688	22	120-30.29A note,
		120-30.36 note,
		150A-63.1 note
689	1	128-27
689	2	135-5
689	3	135-59
690	1	105-434,
		105-435,
		105-436.1,
		105-446,
		105-446.1,
		105-446.3,
		105-446.5,
		105-449,
		105-449.01,
690	2	105-449.16,
		105-449.19,
		105-449.24,
		105-449.30,
		105-449.36
690	3	105-449.38,
		105-449.39
690	4	136-41.1
690	5	136-44.2B
690	6	136-44.2A
690	7	105-164.44A
690	8-10	20-7
690	11	20-14
690	12	20-37.7
690	13	20-26
690	14	20-166.1
690	15	20-324
690	16	20-289
690	17	20-183.7
690	18	105-449.52
690	19	20-85
690	20	20-57
690	21	20-74
690	22, 23	20-42
690	24	20-178
690	25	20-309
690	26	44A-4
690	27, 28	20-118
690	29, 30	20-88
690	31, 32	20-119
690	35	136-41.1 note
690	36	136-44.2B note
690	37	105-164.44A note
691	1	7A-304
691	2	7A-305
691	3	7A-306
691	4	7A-307
691	5	7A-304 note,
		7A-305 note,
		7A-306 note,
		7A-307 note
692	1	153-149
692	2	153A-159
692	3	153A-445
695	1, 2	12-3.1
696	. .	143-240
701	1	113B-7
701	2	113B-8
701	3	113B-9
701	4, 5	113B-3
701	6	143B-450.1
701	7	143B-450.1 note
702	. .	1-52
704	1, 2	7A-29 note,
		62-281 note,
		104E-5 note,
		105-122 note,
		146-22.1 note,
		153A-152.1 note,
		159C-7 note,
		160A-211.1 note
704	3	143B-216.10
		to 143B-216.15
704	4	130-166.16
704	5	130-166.17A,
		130-166.17B
704	6	130-166.18
704	7	130-166.18A,
		130-166.19A,
		130-166.21B,
		130-166.21E
704	8	104E-5
704	9	104E-6.1,
		104E-6.2
704	10	104E-7
704	10.1	104E-9
704	11	104E-10.1
704	11.1	104E-10
704	11.2	104E-16
704	12	104E-18
704	13	104E-19
704	14	104E-24
704	15	160A-211.1
704	16	153A-152.1
704	17	105-147
704	18	105-122
704	19	105-130.10
704	20	105-130.5
704	21	62-281
704	22	159C-7
704	23	146-22.1
704	24	130-166.18B
704	25	104E-21
704	26	7A-29 note,
		62-281 note,

Ch.	Sec.	1981 General Statutes
704	26	104E-5 note,
		104E-6.1 note,
		104E-6.2 note,
		104E-7 note,
		104E-9 note,
		104E-10 note,
		104E-10.1 note,
		104E-16 note,
		104E-18 note,
		104E-19 note,
		104E-21 note,
		104E-24 note,
		105-122 note,
		105-130.5 note,
		105-130.10 note,
		105-147 note,
		130-166.16 note,
		130-166.17A note,
		130-166.17B note,
		130-166.18 note,
		130-166.18A note,
		130-166.18B note,
		130-166.19A note,
		130-166.21B note,
		130-166.21D note,
		130-166.21E note,
		146-22.1 note,
		153A-152.1 note,
		159C-7 note,
		160A-211.1 note
704	27	7A-29 note,
		62-281 note,
		104E-5 note,
		104E-6.1 note,
		104E-6.2 note,
		104E-7 note,
		104E-9 note,
		104E-10 note,
		104E-10.1 note,
		104E-16 note,
		104E-18 note,
		104E-19 note,
		104E-21 note,
		104E-24 note,
		105-122 note,
		105-130.5 note,
		105-130.10 note,
		105-147 note,
		130-166.16 note,
		130-166.17A note,
		130-166.17B note,
		130-166.18 note,
		130-166.18A note,
		130-166.18B note,
		130-166.19A note,
		130-166.21B note,
		130-166.21D note,
		130-166.21E note,
		146-22.1 note,
		153A-152.1 note,
		159C-7 note,
		160A-211.1 note

Ch.	Sec.	1981 General Statutes
704	28	7A-29
704	28.1	130-166.21D
705	1	1-54.1
705	2	153A-348
705	3, 4	1-54.1 note,
		153A-348 note
706	1	58-254.35 to
		58-254.57
706	2	58-254.35 note,
		58-254.58
706	3	58-254.35 note
707	1, 2	148-19
713	1, 2	143-138
713	3	143-138 note
715	. .	143-34.12 note
716	1	7A-517
716	2	7A-549
716	3	7A-549 note
717	1	90-55
717	2	90-57.1 Repealed
717	3	90-60
717	4	90-61
717	5	90-61.1
717	6, 7	90-64
717	8	90-65
717	9	90-85.1
717	10	Ch. 90, Art. 4 note,
		143-34.12 note
719	1	143-131
719	2	143-131 L.M.
720	2	20-43.4
720	3	9-1
720	4	20-43.4 note
721	. .	121-4
722	1	Ch. 90, Art. 20 note,
		143-34.12 note
722	2	Ch. 90, Art. 20 note,
		143-34.13 note
722	3	90-276
722	4	90-277
722	5-7	90-278
722	8	90-282 Repealed
722	9	90-283
722	10, 11	90-285
722	12	90-285.1
722	13	90-286
722	14	90-286 note
722	15	90-285 note
723	. .	58-96
724	. .	105A-2
725	. .	131-170
726	. .	20-118
727	1, 2	20-79.2
728	1	20-50.2
728	2	20-50.2 note
729	. .	113-291.6
730	1	115C-316
731	1	115C-325
732	. .	90-87
733	1	160A-537
733	2	160A-537 note
734	1	97-58

Ch.	Sec.	1981 General Statutes
735	1, 2	50-13.2
735	3	50-13.5
736	1, 2	20-119
737	. .	128-21 L.M.
738	1, 2	90-270.11
739	1, 2	87-10
741	. .	163-22.2
744	. .	141-7.1
745	1	1-233
745	2	1-239
746	2	18B-1007
747	2	105-113.68
747	3	105-113.69
747	4	105-113.70
747	5	105-113.71
747	6	105-113.72
747	7	105-113.73
747	8	105-113.74 Repealed
747	9	105-113.75
747	10	105-113.76
747	11	105-113.77 Repealed, 105-113.78 Repealed
747	12	105-113.79
747	13	105-113.80
747	14	105-113.81
747	15	105-113.82
747	16	105-113.83
747	17	105-113.84
747	18	105-113.85
747	19, 20	105-113.86
747	21	105-113.88
747	22	105-113.89
747	23	105-113.90
747	24	105-113.91
747	25	105-113.92 Repealed
747	26	105-113.93
747	27	105-113.96
747	28	105-113.98
747	29	105-113.99
747	30	105-113.102
747	31	105-113.103
747	32	105-113.104
747	33	20-16
747	34	20-19
747	36	18B-103
747	37	18B-108
747	38	18B-203
747	39	18B-301
747	40, 41	18B-302
747	42	18B-304
747	43	18B-306
747	44	18B-307
747	45	18B-401
747	46, 47	18B-404
747	48	18B-504
747	49	18B-600
747	50	18B-700
747	51	18B-703
747	52	18B-805
747	53, 54	18B-900
747	55, 56	18B-902
747	57	18B-903
747	58	18B-904
747	59	18B-1100
747	60	18B-1101, 18B-1102
747	61	18B-1103
747	62	18B-1109
747	63	18B-1112 to 18B-1117
747	66	14-258.1, 14-269, 14-269.3, 14-443, 20-12.1, 20-16.2, 20-16.3, 20-17, 20-19, 20-23.2, 20-26, 20-28, 20-28.1, 20-138, 20-139.1, 20-140, 20-168, 20-179.1, 90-65, 122-58.22
747	67	105-113.68 note
750	. .	20-63
751	1, 2	90-22
751	3	90-24
751	4	90-26
751	5	90-30
751	6	90-36
751	7	90-41
751	8	Ch. 90, Art. 2 note, 143-34.12 note
752	1	14-148
752	2	14-149
752	3	14-150 Repealed, 14-150.1 Repealed
753	. .	86A-25
754	1	143-129
754	2	143-129 L.M.
755	. .	14-34.1
756	. .	160A-364 L.M., 160A-516 L.M.
757	1, 2	93B-5
758	1	108A-46
758	2	108A-58
758	3	108A-46 note, 108A-58 note
758	4	108A-46 note, 108A-58 note
759	1	58-344
759	2	58-350
759	3	58-346
759	4-6	58-350
759	7	58-359
759	8	58-351
759	9	58-350
759	10	53-189
759	11	53-189 note, 58-344 note, 58-346 note, 58-350 note, 58-351 note
760	1-5	58-79
761	1-5	58-201.1
761	6-14	58-201.2
762	1, 2	96-17
762	3	84-4
763	1, 2	7A-142
763	3	163-9
763	4	115C-37.1
763	5	152-1
763	6	153A-27.1

Ch.	Sec.	1981 General Statutes
763	8, 9	161-5, 161-5 L.M.
763	10	162-5.1
763	11	162-5 L.M.
763	14	163-9 note
763	14	115C-37.1, 153A-27.1, 162-5.1
763	15	7A-142 note, 152-1 note, 153A-27.1 note, 161-5 note, 163-9 note
764	1	133-23 to 133-33
764	2	75-1
764	3	75-1 note, 133-23 note
764	4	75-1 note, 133-23 note
765	1	90-270.25
765	2	Ch. 90, Art. 18 note, 143-34.12 note
766	1	90-139
766	2	90-140
766	3	90-141
766	4	90-143
766	5	90-143.1
766	6	90-145
766	7	90-154
766	8	90-156
766	9	Ch. 90, Art. 8 note, 143-34.12 note
767	1	90-182
767	2	90-184
767	3	90-185
767	4	90-186
767	5, 6	90-187
767	7	90-187.3
767	8-11	90-187.6
767	12, 13	90-187.8
767	14	90-187.13
767	15	Ch. 90, Art. 11 note, 143-34.12 note
768	1	153A-205
769	. .	103-8
770	. .	108A-4
771	1	120-2.1
771	2	163-201.1
772	1	120-30.14
772	2	120-30.18
772	3, 4	120-32.1
772	5	120-32.2
772	6	120-32.3
772	7	120-36.5
773	. .	58-43.1
774	1	96-8
774	2	96-8 note
776	1	58-248.26
776	2, 3	58-248.33
777	1	1-539.15 Repealed
777	2	1-539.16
777	3	1-53
777	4	1-52
777	5	1-52 note, 1-53 note, 1-539.15 note,
777	5	1-539.16 note
780	1	14-32.1
780	2	14-32.1 note
781	1	25-3-512
781	2	6-21.3
781	3	6-21.3 note, 25-3-512 note
782	1	130-202.8, 130-202.9
783	1	87-1
783	2	87-14
783	3	87-1 note, 87-14 note
784	1	116-198.6, 116-198.6 note
784	2	116-198.7
784	3	116-198.8
784	4	116-198.9
784	5	116-198.10
784	6	116-198.11
784	7	116-198.12
784	8	116-198.13
784	9	116-198.14
784	10	116-198.15
784	11	116-198.16
784	12	116-198.17
784	13	116-198.18
784	14	116-198.19
784	15	116-198.20
784	16	116-198.21
784	17	116-198.22
784	18	116-198.23
784	19	116-198.24
784	20	116-198.25
784	21	116-198.26
784	22	116-198.27
784	23	116-198.28
784	24	116-198.29
784	25	116-198.30
784	26	116-198.6 note
784	27	116-198.6 note
785	1	66-106
785	2	66-109
786	1	163-288.3
786	2	69-25.2
787	1	74-50
787	2, 3	74-51
787	4	74-54
787	7, 8	74-64
787	9	Ch. 74, Art. 7 note, 143-34.12 note
788	1	84-2
788	2	84-16
788	3	84-17
788	4	84-18
788	5	84-34
788	6	Ch. 84, Art. 4 note, 143-34.12 note
789	. .	89C-22
790	. .	58-124.19
791	1, 2	143B-481
791	3, 4	143B-482
791	5	143B-483
791	6	143B-481 note

Ch.	Sec.	1981 General Statutes
792	1	62-289.1 to 62-289.7
792	2	20-4.01
792	3	20-7
792	4	20-4.01 note, 20-7 note, 62-289.1
792	5	62-289.1 note
793	1	136-13.2
794	1	116-209.24
795	. .	153A-22
796	1, 2	163-46
797	. .	51-1.1
800	. .	120-2
801	1, 2	147-69.1
804	1	20-137.1
804	4, 5	20-137.1
804	6	20-137.1 note
805	1	14-401.12
805	2	14-401.12 note
806	. .	75-33
807	1-3	74C-3
807	4, 5	74C-10
807	6	74C-12
807	7	74C-4
808	. .	143B-456.1 note
809	1	6-21
809	2	6-21 note
810	. .	1A-1, Rule 14
811	1	90-118.2
811	2	90-118.3
811	3	90-123.1
811	4	90-118.8 Repealed
811	5	90-118.9 Repealed
812	. .	47-50
813	. .	14-271 L.M.
814	1	163-278.8
815	1	50-20
815	2	50-11
815	3	52-1
815	4	1-75.4
815	5	7A-244
815	6	50-21
815	7	1-75.4 note, 7A-244 note, 50-11 note, 50-20 note, 50-21 note, 52-1 note
816	1, 2	58-251.6
817	1	66-94
817	2	66-95
817	3	66-97
817	4	66-99
817	5	66-94 note, 66-95 note, 66-97 note, 66-99 note
818	1	20-359.1
818	2	20-360
818	3	20-358
818	4	20-359.1 note
819	1	105-282.7, 105-282.8
819	2	105-279 Repealed
819	3	105-282.7 note
820	1-3	130-128
821	1	120-1
822	1	14-16.6 to 14-16.9
822	2	114-15
823	1	160A-317
824	1	90-221
824	2, 3	90-233
824	4	Ch. 90, Art. 16 note, 143-24.12 note
826	1	136-69
827	. .	160A-17.1
829	. .	152-1 L.M.
830	. .	115C-37.1
831	. .	143-318.11
832	1	114-19.1
833	. .	130-9
834	1	58-273
834	2	58-280
834	3	58-284
834	4	58-285
834	5	58-292
834	6	58-308
834	7	58-309
835	. .	105-277.4
836	1	106-65.39
837	1	163-278.6
837	2	163-278.9
837	3	163-278.6 note, 163-278.40, 163-278.40A to 163-278.40I
837	4	163-278.27
837	5	163-278.40 note
839	. .	20-24
840	1	14-2.3
840	2	14-2.3 note
841	1	58-213.18 to 58-213.21
841	2	58-213.18
841	4	90-322 note
844	1	24-11
844	2	24-11 note
845	. .	58-41.5
846	1	58-380 to 58-404
846	2	58-9
846	4	58-378 note
847	1	7A-506
848	1-3	90-321
848	5	90-322
849	1	108A-41
849	2	108A-55
852	. .	90-171.21
852	3	90-171.37
852	4	90-171.23
853	2	70-26 to 70-40
853	4	14-148
853	5	14-149
853	6	70-26 note
854	1	113-281 to 113-287
854	2	113-283 note
855	1	105-130.5
855	2	105-102.3
855	3	105-122
856	1	143B-456
856	2	143B-456.1, 143B-456.1 note
856	3	143B-463
856	4-6	143B-456 note,

Ch.	Sec.	1981 General Statutes
856	4-6	143B-456.1 note, 143B-463 note
856	7	143B-456.1 note
857	. .	20-97
858	. .	20-97
859	9	143-28.1
859	13.3	120-36.5
859	13.9	15A-744
859	13.10	114-4.2E Repealed, 164-25 to 164-34 Repealed
859	13.12, 13.13	135-33
859	13.14, 13.15	135-33.1
859	13.16	135-34
859	13.17	135-35 Repealed
859	13.18	135-38
859	16	108A-93
859	23.2	131D-3
859	23.3	131D-4
859	23.4	146-30
859	25	148-32.1
859	29.1	115C-329
859	29.7	115C-140.1
859	29.12	115C-326
859	35.1	115D-5
859	35.2	115D-3
859	41.4	116-143
859	41.5	116-37
859	42, 42.1	135-5
859	43	143-166
859	44	135-5
859	45	143-166
859	46	7A-39.3, 7A-39.3 note
859	47	7A-52, 7A-52 note
859	47.1	143-2, 143-3, 143-3.2, 143-4, 143-17, 143-23.1, 143-25, 143-28
859	48-51	143-341
859	52, 53	14-247
859	57-59	138-6
859	69	136-44.11
859	76	20-63
859	77	20-86.1
859	78	20-91
859	79	105-260
859	80	105-262
859	81	143B-218
859	82	143B-219
859	84	136-44.2
859	85	120-74
859	86	120-75
859	87	120-76
859	88, 89	120-79
859	94	58-7.3
859	97	7A-39.3 note, 7A-52 note, 14-247 note, 15A-744 note, 20-63 note, 20-86.1 note,
859	97	20-91 note, 58-7.3, 105-260 note, 105-262 note, 108A-93 note, 114-4.2E note, 115D-3 note, 115D-5 note, 116-37 note, 116-143 note, 120-36.5 note, 120-74 note, 120-75 note, 120-76 note, 120-79 note, 131D-3 note, 131D-4 note, 135-5 note, 135-33 note, 135-33.1 note, 135-34 note, 135-35 note, 135-37 note, 135-38 note, 136-28.1 note, 136-41.1 note, 136-44.2 note, 136-44.11 note, 138-6 note, 143-17 note, 143-23.1 note, 143-25 note, 143-28 note, 143-28.1 note, 143-166 note, 143-341 note, 146-30 note, 148-32.1 note
859	98	135-38 note
860	12	143-31.1
860	13	143-135
861	. .	136-76.1
862	1	15A-1381 to 15A-1383
862	2	7A-608.1
862	3	15A-502
862	5	7A-608.1 note, 15A-1381 note
864	1	157-5
865	1, 2	160A-457.1
866	1, 2	115C-444
866	3	115C-446
867	1, 2	131A-3
867	3-5	131A-3 note
868	. .	160A-514 L.M.
869	. .	147-62
870	. .	143-47.15
871	. .	143B-214
872	1	10-8
873	. .	113-189
875	. .	58-173.27
876	. .	53-189
878	. .	160A-288.2
880	1, 2	14-288.20
880	3	14-288.20 note
881	1	113A-153 note
881	3	113A-153, 113A-154 Repealed, 113A-157 Repealed
881	4	143B-279
882	1	31C-1 to 31C-12
882	2	31C-1 note
883	. .	96-13
884	1	53-92

Ch.	Sec.	1981 General Statutes
884	2	58-7 Repealed
884	3	58-241.6
884	4	74A-2
884	5	86A-6
884	6	86A-7
884	7	88-14
884	8	90-130
884	9	90-245
884	10	143-3.2
884	11	143-246
884	12	147-57 Repealed
884	13	128-8 Repealed
884	14	147-67 Repealed
886	1	131C-1 to 131C-22
886	2	131C-1 note
888	1-3	58-124.17
888	4	58-124.18
888	5	58-131.36
888	6	58-366
888	7	58-371
889	1	15A-1340.4
890	1	66-152 to 66-157
890	2	6-21
890	3	6-21 note, 66-152 note
891	1	160A-364
891	2	153A-323
891	3	160A-364.1
891	4	1-54.1
891	5	160A-381
891	6	153A-340
891	7	160A-388
891	8	153A-345
891	9	153A-323
891	10	160A-364.1 note
891	11	63-33
891	12	160A-364.1 note
892	. .	14-136
893	. .	1-597 L.M.
894	. .	163-201
895	1	122A-4 note
895	2	122A-4
895	3	122A-5
895	4	122A-16
896	1	20-7.2
896	2	7A-304
897	. .	115D-5
898	1-4	130-128
899	1	105-147, 105-151.11
899	2	105-151.11 note
900	. .	15-194
901	1	115C-47
901	2	115D-20
901	3	116-33.1
902	1-3	15A-701
903	1	90-113.23, 90-113.24
904	2	70-10 to 70-20
905	. .	116-143.1
906	5	118-1 L.M.
907	1, 2	160A-503
907	3, 4	160A-516
908	1	9-10 note
909	. .	90-123
910	1	76A-1 to 76A-6, 76A-12 to 76A-18, 76A-24, 76A-25
910	2	76-1 to 76-17 Repealed, 76-19 to 76-24 Repealed
910	3	76A-1 note
911	. .	143-138 L.M., 160A-486 L.M.
912	1	115C-250
912	2	115C-126.1
913	1	113A-103
913	2	113A-121
913	3	113A-121.1
913	4-6	113A-122
914	1	7A-171.1
914	2	7A-171.1 note
915	. .	105-282.1
916	1	58-124.26
916	2, 3	58-248.34
916	3a	58-30.4
916	4	58-30.4 note, 58-124.26 note, 58-248.34 note
917	1	126-74 to 126-79
917	2	126-74 note
918	1	143B-53
918	2	143B-90
918	3	143B-91
918	4	125-2
919	1	40-1 to 40-53 Repealed, 40A-1 to 40A-13, 40A-19 to 40A-34, 40A-40 to 40A-56, 40A-62 to 40A-69
919	2	62-183
919	3	62-185
919	4	62-186 Repealed
919	5	62-187
919	6	62-188 Repealed
919	7	63-6
919	8	63-49
919	9	73-5 to 73-13 Repealed, 73-14 to 73-22 Repealed, 73-24 Repealed
919	10	77-11
919	12	117-2
919	13	130-130
919	14	130-166.47
919	15	130-213
919	16	131-15
919	17	131-28.14
919	18	131-99
919	19	139-38
919	20	153A-159 to 153A-162 Repealed
919	21	153A-158
919	22	153A-292
919	23	156-1
919	24	156-67
919	25	157-11
919	26	157-50
919	27	159B-33

Ch.	Sec.	1981 General Statutes
919	28	160A-240 Repealed, 160A-241 to 160A-261 Repealed, 160A-263 Repealed
919	29	160A-240.1
919	30	160A-515
919	31	162A-36
919	32	162A-69
919	33	40A-1 note, 160A-240.1 note
920	1	97-29
920	3	97-29 note
921	1	105-130.28 to 105-130.33
921	2	105-151.7 to 105-151.10
921	3, 4	105-130.23
921	5, 6	105-151.2
921	7	105-130.28 to 105-130.33 note, 105-151.7 to 105-151.10 note
922	1-4	90-96
922	5-7	90-113.14
922	8	90-96.01
922	11	90-96.01 note
923	1	131D-19 to 131D-33
923	3	131D-19 note, 131D-31 note, 131D-32 note, 131D-33 note
924	1	48-2
924	2, 3	48-25
925	1	113A-134.1 to 113A-134.3
926	1	153-98, 160A-168
926	2-4	160A-168
926	5-8	153A-98
927	. .	143-509
928	. .	15A-504
929	. .	143B-475
931	2	143B-480.1 to 143B-480.3
931	3	143B-479
931	5	143B-480.1 note
932	1	Ch. 66, Art. 9B note, Ch. 66, Art. 9C, Ch. 74, Art. 7 note, Ch. 76, Art. 6 note, Ch. 81A, Art. 5 note, Ch. 84, Art. 4 note, Ch. 85B note, Ch. 85C note, Ch. 88 note, Ch. 89B note, Ch. 90, Art. 1 note, Ch. 90, Art. 2 note, Ch. 90, Art. 4 note, Ch. 113, Art. 17 note, Ch. 113A, Art. 4 note, Ch. 113A, Art. 7 note,
932	1	113A-100 note, 122-72 note, 143-34.10 Repealed, 143-34.12 to 143-34.21 Repealed, 143-34.12 to 143-34.21 note, Ch. 143, Art. 21, Part 1 note, Ch. 143, Art. 21, Part 2 note, Ch. 143, Art. 21, Part 4 note, Ch. 143, Art. 21, Part 5 note, Ch. 143, Art. 21, Part 6 note, Ch. 143, Art. 21, Part 6A note, Ch. 143, Art. 21, Part 7 note, Ch. 143, Art. 21A note, Ch. 143, Art. 21B note, Ch. 143, Art. 38 note, Ch. 143, Art. 52, Part 3 note, Ch. 143, Art. 52, Part 4 note
932	2	143-34.25, 143-34.26, 143-34.27
932	2.1	146-22.1 note
933	. .	24-10
934	1	24-1.1
934	2	24-1.2
936	1	122-58.27
936	2	15A-533
936	3	15A-533 note, 122-58.27 note
937	1	8B-1 to 8B-8
937	2	8B-9
937	3	7A-450
937	4	7A-450 note, 8B-1 note
938	1	20-29
938	2	20-45
938	3	20-111
938	4	20-312
938	5	20-20 Repealed
938	6	20-29 note, 20-45 note, 20-111 note, 20-312 note
939	1	99C-1 to 99C-5
939	3	99C-1 note
940	1	135-5, 128-27
940	2	135-59
940	3	143-166
941	. .	130-130 L.M., 160A-266 L.M.
944	1	143-166.2
944	2	143-166.7
946	1	115C-272

Ch.	Sec.	1981 General Statutes
946	2	115C-285
946	3	115C-316
947	1	115C-302
947	2	115C-316
949	1	130-160 Repealed
949	2	130-166.22 to 130-166.33 Recodified
949	3	130-166.62 to 130-166.72
949	4	130-17
951	. .	130-156.5
952	1	143-145 to 143-151.5, Ch. 143, Art. 9A note
952	2	143-143.8 to 143-143.23
952	3	20-288
952	4	143-143.8
952	6	143-143.8 note
953	. .	143-56
954	1	163-30
954	2	163-41
954	3	163-42
954	4	163-41
954	5	163-43
955	1	28A-21-1
955	2	28A-21-2
955	3	33-39
955	4	28A-1-1
956	1	66-163 to 66-173
956	2-5	66-163 note
957	. .	105-147
958	1	95-98.1, 95-98.2
958	2	95-98.1 note, 95-98.2 note
959	1	7A-304
959	2-4	7A-304 note
960	. .	132-6 L.M., 132-9 L.M.
961	1-3	143B-153
962	1-5	14-292.1
963	1	105-159.1 note, 163-278.41 note
964	1	7A-41
964	2	7A-41, 7A-41 note, 7A-60, 7A-69
964	3	7A-60
964	4	7A-133, 7A-133 note
964	5	7A-44.1 note
964	6	7A-95 note
964	7	7A-102 note
964	8	7A-69.1
964	9	7A-60 note
964	11	7A-475 to 7A-483
964	14	7A-101
964	18	7A-44
964	19	20-125, 122-98, 143-166.13
965	1, 2	115C-366.2
966	1	7A-289.23
966	2	7A-289.27
966	3	7A-289.30
966	4	7A-451
966	5	7A-289.23 note, 7A-289.27 note, 7A-289.30 note, 7A-451 note
967	. .	88-19
968	1, 2	161-10
968	3	161-4.1 note, 161-10 note,
968	4	161-4.1
968	5	161-4.1 note
969	1, 2	14-208
970	1	24-1.1C
970	2	25A-2
973	1, 2	105-147
975	1	143-166
	2	128-27
975	3	135-5
975	4	135-60
976	1-4	20-87
976	5	20-87.1
976	6	20-88
976	7	20-89 Repealed
976	8	20-90 Repealed
976	9	20-91
976	10	20-93 Repealed
976	11	20-110
977	. .	105-37.1
978	1, 2	135-5
978	3, 4	128-27
978	5	143-166
978	6	135-57
978	7	135-72
979	1	135-3
979	2	128-24
980	1, 2	128-27
980	3, 4	135-5
980	5	135-60
980	6	143-166
981	1, 2	128-27
982	. .	105-164.13
984	1, 2	105-164.4
987	. .	143B-456.1 note
988	1	143B-456.1 note
989	1-3	58-241.7
989	4	58-241.9
989	5	58-241.34
989	6	58-241.11
990	1	93D-5
990	2	93D-6
990	3	93D-9
990	4	93D-11
990	5	93D-13
991	. .	20-97
994	. .	143-260.10A
997	1	7A-133 note
1000	1	128-30, 135-8
1000	2	135-8
1000	3	128-30

Ch.	Sec.	1981 General Statutes
1001	1	1-369 to 1-392 note, 1C-1601 note
1001	3	66-164
1001	4	66-168
1001	5	66-164 note
1012	. .	122-55.8 143B-128
1022	. .	62-71
1029	1	118-18 to 118-32 rewritten as 118-33 to 118-49, 118-33 to 118-49
1029	2	118-33 note
1029	3	143A-27.1
1052	1	105-277.1, 105-309
1052	2-4	105-277.1A
1052	5	105-277.1A note
1100	1	14-139 Repealed
1100	2	113-60.21 to 113-60.31
1109	2	143-300.6
1109	3	143B-424.1
1109	4	58-194.2
1116	1	135-4
1117	1, 2	63-68
1127	7	147-11
1127	9	120-37
1127	11	7A-171.1
1127	12	7A-101
1127	24-29	131-176
1127	30	131-175 note
1127	33	146-30
1127	39, 40	115C-325
1127	43	115D-4
1127	45	113A-183
1127	47	130-166.65
1127	49	122-98
1127	53	20-86.1, 20-91, 105-260, 105-262, 143B-218, 143B-219
1127	53.1	20-118
1127	54	136-41.1
1127	55	120-30.34
1127	56	58-387, 40-404
1127	58	58-262.13
1127	63	120-84.1 to 120-84.5
1127	70	143B-344.3 to 143B-344.10 Repealed
1127	78	115C-517
1127	82	143-23
1127	84	15A-1355
1127	89	7A-101 note, 7A-171.1 note, 15A-1355 note, 20-86.1 note, 20-91 note, 20-118 note, 105-260 note, 105-262 note, 113A-183 note, 120-30.34 note, 120-37 note, 120-80 note, 122-98 note, 130-166.65 note, 131-175 note, 131-176 note, 136-41.1 note, 143-23 note, 146-30 note, 147-11 note
1128	1, 2	166A-6.1
1130	3	120-2 note, 163-104 note

SESSION LAWS OF 1982

Ch.	Sec.	General Statutes
1130	1, 3	120-2
1131	1	7A-289.31
	2	7A-289.35
	3	7A-289.29
	4	7A-289.35
1132	. .	152-1 L.M.
1141	. .	153A-265 L.M.
1142	. .	18B-600 L.M.
1144	. .	152-1 L.M.
1147	1	136-131.1
	2	136-131.1 note
1150	. .	130-130 L.M., 160A-266 L.M.
1153	. .	65-53
1154	. .	105-381 L.M.
1155	. .	14-399 L.M.
1159	. .	20-84
1162	. .	160A-457 L.M.
1163	. .	55-73
1165	. .	113-60.23
1171	. .	105-360 L.M.
1175	. .	159-6
1176	1	76A-31 to 76A-36, 76A-42 to 76A-48, 76A-54
	2	76-59 to 76-73 Repealed
	3	76A-31 note, 76A-42 note, 76A-54 note
1177	1	72-7
	2	105-147
	3	168-4.1
	4	168-7.1
1178	1, 2	96-17
	3-14	96-12

Ch.	Sec.	1982 General Statutes
1178	15	96-14
1180	. .	113-291.1 L.M.
1181	1	143B-456
	2	143B-454
1182	1	143-250
	2	75A-3
1185	1	160A-398.1
	2	160A-399.1
	3	160A-399.4
1186	1	62-52
	2	62-3
1187	1	95-54 to 95-69.2 Repealed
1187	2, 3	95-69.12
	4	95-69.13
1188	1	90-53 to 90-75 recodified as 90-85.2 to 90-85.26, 90-85.32 to 90-85.40, 90-53 to 90-75 note, 90-85.2 to 90-85.23, 90-85.25, 90-85.26, 90-85.32 to 90-85.40
	2	90-85.24, 90-85.24 note
	3	90-76.1 to 90-76.5 recodified as 90-85.27 to 90-85.31, 90-85.2 note, 90-85.27, 90-85.27 note, 90-85.28, 90-85.28 note, 90-85.29, 90-85.29 note, 90-85.30, 90-85.30 note, 90-85.31, 90-85.31 note
	4	90-76.6 Repealed 90-77 to 90-80.1 Repealed, 90-85.1 Repealed
1189	1	7A-740
	2	115C-176
	3	143B-312
	4	143B-478
1190	. .	152-1 L.M.
1191	1	120-121 note
	2	120-121 to 120-123
	3, 4	147-12
	5	143B-13
	6-8	143B-426.9
	9, 10	143B-350
	11	135-6
	12	143B-426.4
	13	143B-414
	14	143B-415
	15	143B-479
	16	143B-480.1, 143B-480.2
	17	143B-476
	18	143B-434
	19	143B-283
	21, 22	143B-481
	23, 23.1	143B-403.2
	24-26	143B-422
1191	27	143B-423
	28	113A-137
	29	129-40
	31	17C-3
	32	122A-4
	33	122A-4 note
	34	122A-16
	36, 37	113-315.25
	39	126-64
	40-43	115C-223
	44-46	143B-441
	47	106-26.13
	48	143-166
	49-52	140-5.13
	53	140-5.13 note
	54, 55	116-37.1
	55.1-57	143B-148
	58-62	143B-216.12
	63	160A-6 to 160A-10 Repealed
	64, 65	160A-6 to 160A-10 note
	66	143B-373
	67	120-32
	68	147-12
	69-71	143B-452
	72, 73	143B-223
	74-76	143B-407
	77	143B-154
	78	143B-153.1
	79	143-240
	80	143-241
	81	143-242
	82	90-270.25
	83	90-270.25 note
1194	. .	143B-92 note
1195	. .	20-123
1196	1-5	24-1.1C
1197	1	62-133.2
	2	62-134
	3	62-134 note
	4	62-133.2 note
	5	62-133 note
	6	62-133
1198	. .	14-234 L.M.
1200	. .	14-404 L.M.
1201	1	113-270.2
	2	113-270.3
	3	113-270.4
	4	113-270.5
	5	113-271
	6	113-272
	7	113-272.2
	8, 9	113-270.1 note, 113-270.2 note, 113-270.3 note, 113-270.4 note, 113-270.5 note, 113-271 note, 113-272 note, 113-272.2 note
1201	10	113-270.1 note

Ch.	Sec.	1982 General Statutes
1202	. .	20-97
1203	1-3	113-291.4
	4	113-291.4 note
1204	1	105-130.27A
	2	105-251.6A
	3	105-130.27A note, 105-151.6A note
1205	1	105-141
	2, 3	105-147
1206	. .	105-449.31
1207	. .	105-164.4
1208	1-3	105-144.2
	4	105-144.2 note
1209	. .	105-250.1 Repealed
	. .	105-113.18
1210	1-3	36A-54
1211	1	105-241.3
	2	105-241.1, 105-266.1
	3	105-449.43
	4	105-147
	5	105-122
1212	. .	105-130.4
1213	. .	105-102.2 Repealed
1215	. .	118-12
1216	. .	115C-518
1217	. .	105-141
1218	. .	105-3
1219	1	105-446.6
	2	105-446.6 note
1220	. .	105-3
1221	1	105-22
	2	105-23
	3	28A-21-2
1222	1-3	105-142
1223	1	105-163.16
	2	105-266
	3	105-163.9
	4	105-241.1
1224	1-7	1C-1601
	8	1C-1602
	9-14	1C-1603
	15	1-305
	16	7A-28
	17	7A-31
	18, 19	1C-1603
	20	1C-1601
	21	1-305 note, 1C-1601 note, 1C-1602 note, 1C-1603 note, 7A-28 note, 7A-31 note
	22	1-305 note, 1C-1601 note, 1C-1602 note, 1C-1603 note, 7A-28 note, 7A-31 note
1225	. .	7A-243
1226	1	9-2
	2	9-2 note
1227	. .	105-92 Repealed
1228	. .	105-44 Repealed
1229	. .	105-68 Repealed
1230	. .	105-102 Repealed
1231	. .	105-96 Repealed
1232	1	150A-13
	2	120-30.34
1233	1	120-30.25
	2	120-30.28
	3	120-30.29A
	4	120-30.35
	5	120-30.36
	6	150A-59
	7	150A-63.1
1234	1	90-276
	2	90-278
	3	90-285
	4	90-280
1235	. .	118-1 L.M.
1236	. .	160A-265
1237	. .	130-128
1238	1	54B-4
	2	54B-216
	3	54B-22
	4	54B-20
	5	54B-30
	6	54B-31
	7	54B-33
	8	54B-35
	9	54B-32
	10	54B-39
	11	54B-44
	12	54B-121
	13	54B-122
	14	54B-147
	15	54B-160
	16	54B-161
	17	54B-162
	18	54B-186
	19	54B-193
	20	54B-194
	21	54B-210
	22	54B-102
1239	1	20-161.2
	2	115C-46
	3	116-44.4
	4	143-340
	5	20-161.2 note, 115C-46 note, 116-44.4 note, 143-340 note
1240	. .	18B-603
1241	1	N.C. Const., Art. II, § 9
1241	3	N.C. Const., Art. II, § 9 note
1242	1	131-175 note
	2	131-175 note
1243	1	97-79
	2	97-80
	3	40A-40
1244	1, 2	105-275
	3	105-275 note

Ch.	Sec.	1982 General Statutes
1245	1	39-13.6
	2	39-13.6 note
1246	1, 2	105-446.1
1247	. .	159-55 note, 159-101 note, 159-120 note, 159-122 note, 159-123 note, 159-125 note, 159-129 note, 159-132 note, 159-160 note, 159-163.1 note, 159-165 note, 159-176 to 159-178 note, 160A-505 note, 160A-512 note, 160A-515.1 note
1250	. .	20-97
1251	1, 2	18B-700 L.M.
	3	20-219.2
1252	1	36A-59.1 to 36A-59.7
	2	36A-59.1 note
1253	1	7A-31
	2	7A-39.3
	3	7A-52
	4	7A-506
1254	1	105-449.49
	2	105-449.45
1255	. .	20-87
1256	. .	20-16
1257	1	20-7
	2	20-11
	3	20-37.7
1258	1	20-66
	2-4	20-81.1
	5	20-81.2
	6	20-81.3
	7-9	20-81.4
	10-12	20-81.6
	13	20-81.7
1259	1	20-118.3
	2	20-118.1
	3	20-118.3 note
1261	1	20-183.3
	2	20-183.7
1262	1	14-292.1
	2	18B-101
	3	18B-103
	4	18B-111
	5	18B-402
	6-8	18B-403
	9	18B-602
	10	18B-700
	11	18B-702
	12	18B-803
	13, 14	18B-900
	15	18B-1000
	16, 17	18B-1001
	18, 19	18B-1005
1262	20	18B-1007
	21	18B-1112
	22	18B-1001
	23	18B-1006
	24	18B-111 note
1263	1, 2	78A-17
1265	1	163-104 note
	2	163-22.1, 163-22.2 note
1265	3	163-11
	4, 5	153-114
	6	163-67
	7	163-41
1266	. .	75A-9 L.M.
1268	. .	131C-16
1269	. .	113-270.2B
1271	1	130-126.2, 130-126.3
1272	1	14-34.3
	2	14-34.3 note
1273	. .	105-164.4
1274	1	90A-1 to 90A-13 Repealed
	2	90A-50 to 90A-66
	3	90A-1 to 90A-13 note, 90A-50 note
	4	90A-50 note
1275	1	44A-40 to 44A-46
	2	44A-2
	3	44A-2 note, 44A-40 note
	4	44A-40 note
1276	1	159-101 to 159-111
	2	159-55
	3	159-120
	4	159-122
	5	159-123
	6	159-125
	7	159-129
	8	159-132
	9	159-160
	10	159-163.1
	11	159-165
	12	159-176 to 159-178
	13	160A-505
	14	160A-512
	15	160A-515.1
	16	159-55 note, 159-101 note, 159-120 note, 159-122 note, 159-123 note, 159-125 note, 159-129 note, 159-132 note, 159-160 note, 159-163.1 note, 159-165 note, 159-176 to 159-178 note, 160A-505 note, 160A-512 note, 160A-515.1 note
	17	159-55 note, 159-101 note, 159-120 note, 159-122 note, 159-123 note, 159-125 note, 159-129 note, 159-132 note, 159-160 note,

Ch.	Sec.	1982 General Statutes
1276	17	159-163.1 note, 159-165 note, 159-176 to 159-178 note, 160A-505 note, 160A-512 note, 160A-515.1 note
	18	159-55 note, 159-101 note, 159-120 note, 159-122 note, 159-123 note, 159-125 note, 159-129 note, 159-132 note, 159-160 note, 159-163.1 note, 159-165 note, 159-176 to 159-178 note, 160A-505 note, 160A-512 note, 160A-515.1 note
1277	. .	105-163.5
1280	1	20-348
	2	20-348 note
1282	8	135-8
	9	128-30
	11	135-5
	14, 15	147-62
	15.1	115C-84
	19	108A-29
	20.1	130-9 note, 131D-2 note
	20.2B	131D-2
	20.2C	131D-20
	20.2D	143-138
	24	146-30
	25	115C-106 note, 122-35.53 note, 130-9 note, 134A-1 note
	28	120-61
	29	115C-143 Repealed
	30	115C-325
	31	115C-250
	32	115C-106 note, 115C-114 note
	32.1	115C-326
	44	105-59 Repealed
	46	135-4 note
	51	114-2.1
	52	143-63.1
	59, 60	14-250
	62	143-341
	63	147-32
	65	147-68
	66	143-27
	69	105-213
	70	105-213 note
	70.1	105-277.1A
	71.2	7A-41
	72	7A-465
	73	7A-466
	81	7A-41 note, 7A-465 note, 7A-466 note, 14-250 note, 105-213 note, 105-277.1A note, 114-2.1 note, 115C-84 note,
1282	81	115C-250 note, 115C-325 note, 115C-326 note, 120-61 note, 128-30 note, 131D-2 note, 131D-20 note, 135-5 note, 135-8 note, 143-27 note, 143-63.1 note, 143-138 note, 143-341 note, 146-30 note, 147-32 note, 147-62 note, 147-68 note
	83	114-2.1 note
1283	1	128-26
	2	128-26 note
1284	1, 2	128-27
1285	1	18B-101
	2	18B-203
	3	18B-204
	4	18B-208
	5	18B-804
	7	18B-208 note
1286	. .	20-51
1290	. .	121-6
1314	1	153A-140
	2	153A-140 note
1336	1	65-36.2
	2	65-36.3
	3	65-36.2 note, 65-36.3 note
1348	1	143-138
	2	147-45
1349	. .	58-251.4
1359	1	106-253
	2	106-503
	3	74C-5
	4	143B-67
	5	150A-14
	6	150A-63
1372	5	124-5
1382	1, 2	110-91
1384	1	143-408.1 to 143-408.5
	3	143-408.1 note
1385	1	113-60.21
	2	113-60.23
1388	1	131-121 Repealed, 131-121.3 Repealed, 131-124 Repealed, 131-125 Repealed
	2	131-124.1
	3	143B-165
	4	143-47.21 to 143-47.24
	5	131-124.1 note, 143-47.22 note
	6	131-121 note, 131-121.3 note, 131-124 note, 131-125 note
	7	131-124.1 note, 143-47.21 note
	10	120-84.4
	11, 12	120-84.5
1391	1	1-42.8

Ch.	Sec.	1982 General Statutes
1391	2	1-42.8 note
1395	1	14-404
	2	14-409.3
	3	14-403
	4	14-409.2
	5	14-404 note
1396	1, 2	128-24, 135-3
	3	128-26
	4	135-4
	5	128-24 note, 128-26 note, 135-3 note, 135-4 note
1398	1	135-32 to 135-33.1 Repealed, 135-35 Repealed, 135-35 note, 135-36 Repealed
	2	135-34
	2[7]	135-40
	3, 4	135-37
	5	135-38
	6	135-39 to 135-40.14
1399	3	115C-318
1400	. .	148-26
	2	148-26 note

SESSION LAWS 1982, EX. SESS.

Ch.	Sec.	General Statutes
1	1	116-7
	2, 3	116-7 note
2	1, 2	115C-366.1
4	. .	120-2
5	. .	120-1
7	. .	163-201

SESSION LAWS 1982, 2ND EX. SESS.

Ch.	Sec.	General Statutes
1	. .	120-2
1	. .	120-1
3	1-19	163-104 note
	19.1	163-22.2
3	19.2	159-61 note, 163-287 note
	19.3	163-104 note
	20	120-2 note, 163-104 note

SESSION LAWS 1983

Ch.	Sec.	General Statutes
1	. .	103-4
3	. .	161-22.2 L.M.
5	. .	122-35.53
6	. .	122-35.40
7	. .	105-259
8	. .	66-58
9	. .	20-97
12	. .	143-127.1
13	. .	143B-139.3
14	1	108A-42
14	2	108A-41
14	3	108A-24
15	1	110-139.1
15	2	110-139.1 note
17	1	14-336 Repealed
17	2, 3	14-338 Repealed, 14-339 Repealed
18	. .	90-95
21	. .	14-284 L.M., 14-410 L.M., 14-413 L.M.
22	. .	55B-5
23	1	143-118.1
23	2	143-119
23	3	143-120
24	1, 2	53-67
25	. .	122-35.53
26	1	105-228.22 to 105-228.24, 105-228.25 to 105-228.27 Repealed
27	. .	105-213 note
28	1	105-130.11
28	2	105-125
29	1	105-449.22
29	2	105-449.42
29	3	105-449.42A
29	4	105-449.42A note
30	. .	48-7
31	1	105-130.11
32	1	20-130.1
32	2	20-125
33	1	110-136.2
33	2	110-136.2 note
34	. .	8-50.2
35	1	14-84
35	2	67-15 Repealed
35	3	67-15 note
36	1-5	152-1 note

Ch.	Sec.	1983 General Statutes
37	1, 2	90-270.11
38	1	105-102.4
38	2	105-102.4 note
39	1-4	14-272 to 14-275 Repealed
39	5	14-288.4
40	1	143B-180
40	2	143B-181
42	1	14-111.2
42	2	14-111.3
43	. .	20-88
44	1, 2	44A-4
46	1	110-86
46	2	110-91
47	. .	83A-7
48	1-3	143-4
49	. .	161-22.2
50	1	20-85.1
50	2	20-85.1 note
51	. .	20-28
53	. .	90-6
54	. .	50-13.4
55	1	130A-55.1
55	2	130A-55.1 note
61	. .	105-130.5
62	. .	110-91
63	1	120-30.11
65	1	28A-25-1
65	2	28A-25-6
65	3	7A-111
66	1	31B-1
66	2	31B-2
67	1	74C-9
67	2	74C-11
67	3	74C-13
67	4	74C-18
68	1	53-173 note, 53-175 note, 53-176 note, 53-179 note, 53-184 note
69	1-4	90-210.18
69	5	90-210.25
69	6	90-210.18 note
70	. .	15A-1340.4
71	. .	14-4 L.M.
72	. .	90-286
74	. .	14-86.1
75	. .	20-97
76	1	143B-10, 143B-10 note
76	2	143B-10
76	3	143B-10 note
77	. .	20-16.1
81	1	93A-1, 93A-3, 93A-16, 93A-32, 93A-34, 93A-35, 114-4.2C
81	2	93A-1, 93A-3 to 93A-5, 93A-7, 93A-9, 93A-16, 93A-17, 93A-19 to 93A-23, 93A-26, 93A-32 to 93A-36, 93A-38
81	3	93A-10
81	4, 5	93A-2
81	6-8	93A-3
81	9	93A-4, 93A-5
81	10	93A-10
81	11	93A-4
81	12	93A-5
81	13	93A-6
81	14	93A-17
81	15	93A-21
82	1-3	90-270.6
82	4	90-270.11
82	5	90-270.4
82	6	90-270.19
82	7	90-270.19 note
83	. .	48-11
84	. .	136-18
85	1	18B-1106, 18B-1107, 18B-1110
85	2	18B-1200 to 18B-1216
85	3	18B-1106 note, 18B-1107 note, 18B-1110 note, 18B-1200 note
85	4	18B-1200 note
86	. .	14-269
87	. .	20-16.2
88	1	131D-31
88	2	131D-32
88	3	131D-31 note, 131D-32 note
89	1	7A-289.23
89	2	7A-289.32
90	. .	143-151.13
91	. .	15A-402 L.M., 160A-286 L.M.
96	. .	153A-335 L.M.
98	. .	153A-239 L.M., 153A-240 L.M.
99	. .	115C-41 L.M.
101	. .	14-404 L.M.
102	. .	136-18
103	1	89B-3
103	2	89B-3 note
106	1	20-97
107	1	90-130
107	2	90-132

Ch.	Sec.	1983 General Statutes
108	1	89D-4
108	2, 3	89D-5
108	4	89D-4 note, 89D-5 note
109	2	113-133.1
111	1	81A-70
111	2	81A-71
111	3	81A-72
111	4	81A-73
111	5	81A-74 Repealed
111	6	81A-80
113	1	18B-600
113	2	18B-603
116	. .	14-284 L.M., 14-410 L.M., 14-413 L.M.
118	. .	14-4 L.M.
119	. .	160A-492 L.M.
125	. .	160A-314 L.M.
126	1	24-2.3
126	2	25A-15
126	3	24-1.2
126	4	24-1.1A
126	5	24-11
126	6	24-1.4
126	7	25A-14
126	8	24-2.2
126	9	24-16.1
126	10	24-11
126	11	24-2.1
126	12	53-175
126	13	53-173
126	14, 15	53-176
126	16	24-2.2 note, 24-2.3 note
127	. .	161-22
130	1	160A-266
130	2	153A-176
130	3	130-128
131	. .	20-141
132	. .	20-128
133	. .	7A-655
133	2	7A-652
135	1	15A-1343
135	2	7A-455
135	3	7A-455 note, 15A-1343 note
136	1	106-65.84
136	2	106-65.85
136	3	106-65.86
136	4	106-65.87
136	5	106-65.88
136	6	106-65.89
136	7	106-65.90
136	8	106-65.91
136	9	106-65.84 note
137	1, 2	113-291.1
138	1, 2	122-58.14
139	. .	105-159.1
140	1	113-270.2
140	2, 3	113-270.3
140	4	113-270.4
140	5	113-270.5
140	6	113-271
140	7	113-272
140	8	113-272.2
140	9	113-273
140	10	113-273 note
140	11	113-270.1 note, 113-270.2 note, 113-270.3 note, 113-270.4 note, 113-270.5 note, 113-271 note, 113-272 note, 113-272.2 note
141	. .	58-21.2
142	1	58-254.35 note
142	2	58-254.42
142	3	58-254.45
142	4	58-254.42 note, 58-254.45 note
143	1	131E-116
143	2	131E-115
143	3	131E-125
143	4-9	131E-128
144	1, 2	54B-4
144	3	54B-10
144	4	54B-11
144	5	54B-12
144	6	54B-33
144	7	54B-43
144	8	54B-261
144	9	54B-14
144	10	54B-21
144	11	54B-23
144	12	54B-25
144	13	54B-35
144	14	54B-55
144	15	54B-57
144	16	54B-77
144	17	54B-101
144	18	54B-150
144	19	54B-151
144	20	54B-154
144	21	54B-195
144	22	54B-210
144	23	54B-236
144	24	54B-244
145	. .	14-404 L.M.
146	1	106-657
146	2, 3	106-660
146	4	106-659
146	5	106-665
147	1	148-11
147	2	150A-1
147	3	150A-58
148	1	122A-3
148	2	122A-5
148	3	122A-5.6
148	4	122A-4
148	5	122A-5.6 note
149	. .	157-51 Repealed
150	. .	40A-41 L.M.,

Ch.	Sec.	1983 General Statutes
150	. .	153A-158 L.M.,
		160A-1 L.M.
151	. .	14-402 note,
		14-409 note
153	. .	20-141 L.M.
155	1	105-147
155	2	105-147 note
156	. .	105-164.13
158	1, 2	159-30
158	3	159-31
158	4	147-69
158	5	147-78
160	. .	20-162.1 L.M.
161	. .	160A-388 L.M.
162	1, 2	58-124.23
163	. .	116-11
164	. .	95-148
165	1-4	162-39
166	. .	67-31 L.M.,
		67-36 L.M.
169	. .	91-2 L.M.,
		91-3 L.M.,
		91-4 L.M.
170	1	8-57
170	2	8-57 note
171	1	113A-118.1
171	2	113A-118.1 note
172	1	113A-121
172	2	113A-122
173	. .	113A-118
175	1	14-12.7
175	2	14-12.9
175	3	14-12.10
175	4	14-27.2
175	5	14-27.4
175	6	14-33
175	7	14-190.8
175	8	14-316.1
175	9	14-318
175	10	14-12.7, 14-12.7 note,
		14-12.9, 14-12.9 note,
		14-12.10, 14-12.10 note,
		14-27.2, 14-27.2 note,
		14-27.4, 14-27.4 note,
		14-33, 14-33 note,
		14-190.8, 14-190.8 note,
		14-316.1, 14-316.1 note,
		14-318, 14-318 note
176	. .	160A-385 L.M.
177	. .	84-24
181	1, 2	7A-506
182	. .	105-381 L.M.
183	1, 2	89C-14
185	1, 2	93-1
185	3	93-8
185	4-11	93-12
185	12	93-13
186	. .	44-51.8
188	1, 2	20-97
189	. .	153A-185 L.M.
190	1	20-88
192	. .	163-227.2 L.M.
193	1	106-65.40
193	2	106-65.40 note
194	. .	75A-5
195	. .	105-135
196	1-3	90-85.3
196	4	90-85.7
196	5	90-85.15
196	6, 7	90-85.20
196	8	90-85.24
196	9	90-85.27
197	1, 1.1	20-43.4
197	2	9-2
198	. .	105-24
199	. .	7A-548
200	. .	75A-6 L.M.
201	1	1A-1, Rule 5
201	2	1A-1 Rule 30
201	3	1A-1, Rule 5 note,
		1A-1, Rule 30 note
204	1	116B-17
204	2	116B-21
204	3	116B-29
204	4-7	116B-30
205	1	10-12
205	2	10-12 note
207	. .	160A-514 L.M.
209	. .	115C-441 L.M.
210	. .	163-22.1
214	1	53-1
214	2	53-43
214	3	53-47
214	4	53-48
214	5	53-62
214	6	53-64
214	7	53-66 Repealed
214	8	53-80
214	9	53-91
215	. .	90-280
216	1, 2	163-213.8
217	1-4	90-202.4
217	5	90-202.5
217	6	90-202.6
217	7	90-202.7
218	1, 2	163-66
219	. .	162-34
220	1	105-253
220	2	105-433
220	3	105-449.5
221	. .	113-221
222	1, 2	143-356 Repealed,
		143-357 Repealed
222	3	143B-282
223	. .	20-39
225	. .	163-128 L.M.
229	1, 2	20-166.1
231	. .	1-75.3, 1-75.4,
		1-75.6
235	. .	160A-514 L.M.,
		160A-516 L.M.
239	. .	160A-272 L.M.
241	. .	105-360 L.M.
245	. .	20-129.1

Ch.	Sec.	1983 General Statutes
246	1	106-557
246	2	106-562
247	1, 2	115C-109
247	3	115C-110
247	4	115C-110, 115C-113
247	5	115C-112
247	6	115C-116
248	1	106-67.1 to 106-67.8 Repealed
248	2	106-173.1 to 106-173.16 Repealed
248	3	106-189.1 Repealed
249	1, 2	113A-105
251	1	7A-531
251	2	7A-531 note
252	. .	20-57
253	1-3	20-63
254	. .	20-143.1
255	. .	160A-456 L.M.
257	1	147-26
257	2	147-26 note
258	1-3	113-229
259	. .	74C-3
260	. .	160A-286 L.M.
261	1	110-105
261	2	110-105 note
265	. .	160A-514 L.M.
267	1	143-341
267	2	143B-426.21
267	3	143B-426.21 note
270	. .	143-135 L.M.
273	. .	105-472 L.M.
275	1, 2	122-58.12
276	1	7A-655
276	2	7A-289.6
277	. .	110-90.1, 110-91
278	1, 2	143B-153
279	1	74-75 to 74-89
279	2	143B-290
279	3	74-75 note
280	. .	122-35.36
281	. .	122-35.45A
281	2	122-35.45A note
282	1	104D-1
282	2	104D-2
282	3	104D-6 Repealed
283	1, 2	110-106
283	3	110-106 note
284	. .	105-321 L.M., 105-353 L.M., 105-357 L.M.
285	. .	18B-600 L.M.
288	. .	20-51
289	1	148-18.1
289	2	148-18.1 note
290	1	106-539
290	2, 3	106-540
290	4	106-542
290	5	106-543
290	6	106-548
292	. .	48-6
293	1	108A-14
294	1, 2	15-27.2
294	3	15A-303
294	4	15A-543
294	5	20-24
294	6	90-95
294	7	90-108
295	. .	143-128 L.M., 143-135 L.M.
296	1	143-214.1
296	2, 3	143-215.1
296	4	143-215.5
296	5-8	143-215.3
296	9	143-215.4
297	1, 2	110-86
297	3	110-103
298	1	N.C. Const., Art. III, § 7 note
298	2	N.C. Const., Art. IV, § 18 note
298	3-5	N.C. Const., Art. III, § 7 note, N.C. Const., Art. IV, § 18 note
299	. .	153A-239 L.M., 153A-240 L.M.
300	1	105-51.1
300	2	105-51
300	3	105-51.1 note
301	. .	160A-58.1 L.M., 160A-58.4 L.M.
302	1	122-56.5
302	2	90-21.5
303	1	105-147
303	2	105-147 note
304	1	163-230.1
304	2	163-230.1 note
306	. .	143-215.25
307	. .	113A-119
308	. .	115C-72
309	. .	50-20
310	. .	163-152 L.M.
311	. .	115D-2.1
312	. .	20-286
313	1	90-320
313	2-4	90-322
314	1	127A-7
314	2, 3	127A-80
314	4	127A-81
315	1	127A-50
315	2	127A-51
315	3	127A-50 note, 127A-51 note
315	4	127A-50 note, 127A-51 note
316	1	127A-51
316	2	127A-52
316	3	127A-53
316	4	127A-55
316	5	127A-56
317	. .	20-81
318	. .	136-131.1 note
319	. .	63-68
320	1, 2	131C-5
321	1	153A-185
321	2, 3	153A-186
321	4	153A-204.1

Ch.	Sec.	1983 General Statutes
321	5, 6	153A-440.1
321	7	153A-204.1 note
322	1	159E-1 to 159E-15
322	2	142-8
322	3	159-92
322	4	159-128
322	5	159-129
322	6	159-134
322	7, 8	159-139
322	9	159-164
322	10-12	159-172
322	13	159E-1 note
323	1	20-81.8
323	2	20-81.8 note
324	1	163-8
324	2	163-25
324	3	163-59
324	4	163-151
324	5	163-170
324	6	163-302
325	1	143B-357
325	2	143B-357 note
325	3	143B-357 note
326	1, 2	20-37.6
327	1	113-53.1
327	2	113-54
327	3	113-55
327	4	15A-302
327	5	113-55.1
327	6	113-55.2
327	7	113-53.1 note, 113-55.2 note
328	1	53-92
328	1.1	120-123
328	2	53-92 note
328	3	53-92
328	4	53-97 Repealed
329	. .	163-181
330	1	163-106
330	2	163-291
330	3	163-294.2
331	1	163-108
331	2	163-226.3
331	3	163-227
331	4	163-251
331	5	163-213.2, 163-283
331	6	163-278.6
332	1	42-29
332	2	42-28
332	3	7A-217
332	4	7A-217 note, 42-28 note, 42-29 note
333	1	162A-65
333	2	162A-67
333	3	162A-69
333	4	162A-81
333	5	162A-81 note
334	. .	113A-134.3
335	1	45-21.16
335	2	45-21.21
341	. .	160A-41 L.M.
349	. .	14-398 L.M.
351	5	160A-44
351	5	160A-44 note
353	. .	160A-265 L.M.
355	. .	143-135 L.M.
360	. .	115C-521 L.M., 115C-441 L.M.
362	. .	14-399 L.M.
363	. .	115C-500 L.M.
364	. .	14-234 L.M.
365	. .	87-1 L.M., 89C-1 L.M., 133-1 L.M., 143-128 L.M., 153A-1 L.M.
366	. .	160A-388 L.M.
367	. .	159-17 L.M.
373	. .	143-318.9 L.M., 150A-45 L.M.
374	1	58-124.30
374	2, 3	58-97
375	1	8-103
375	2	90-101
375	3	8-103 note
376	. .	148-22
377	1	143-139.2
377	2	153A-357
377	3	160A-417
377	4	153A-361
377	5	160A-421
377	6	153A-373
377	7	160A-433
377	8	153A-322
377	9	160A-363
378	1	115D-20
378	2	40A-3
378	3	115D-20 note
379	1, 2	105-65.1
380	1	15A-1003
380	2	15A-1004
380	3	15A-1321
380	4	122-58.4
380	5	122-58.6
380	6	122-58.7
380	7	122-58.7A
380	8	122-58.8
380	9	122-58.20
380	10	122-58.4, 122-58.4 note
381	1	153A-193.1
381	2	153A-194
381	3	153A-196
381	4	160A-226.1
381	5	160A-227
381	6	160A-229
381	7	153A-193.1 note, 153A-194 note, 153A-196 note, 160A-226.1 note 160A-229
382	. .	91-2 L.M., 91-3 L.M., 91-4 L.M.
383	1	122-35.35
383	2	122-35.36
383	3	122-35.43
383	4	122-56.3

Ch.	Sec.	1983 General Statutes
383	5	122-58.3
383	6	122-58.13
383	7	122-70
383	8	122-71.1
383	9	122-7.1
383	10	122-8.1
384	. .	93A-4
386	1	57B-3
386	2	57B-4
387	. .	20-347
388	1, 1.1	69-25.1
388	2	69-25.1 note
389	. .	15A-1353
390	1	84-18.1
390	2, 3	84-28
390	4	84-28.1
390	5	84-32
390	6	84-29
391	1	47-108.18
391	2	47-108.18 note
392	1	163-33
392	2	163-72.3
392	3	163-72.3 note
393	1	58-366
393	2	58-371
394	1-6	115C-325 note
395	. .	106-564.1
396	. .	58-173.27
397	1	14-119
397	2	14-120
398	1	45-20.1
398	2	47-51
398	3	47-53
398	4	47-53.1
398	5	47-71.1
398	6	47-108.5
398	7	47-108.11
398	8	45-20.1 note, 47-51 note, 47-53 note, 47-53.1 note, 47-71.1 note, 47-108.5 note, 47-108.11 note
399	. .	113A-121
400	1, 2	113A-121.1
401	1, 2	160A-442
402	. .	122-35.53
403	. .	113-264
405	. .	160A-266 L.M.
406	. .	143-340
407	. .	20-118
408	. .	115C-41
409	1	143-58.1
409	2	143-58.1 note
410	1, 2	8-53
410	3	8-53.3
410	4, 5	8-53.4
410	6	8-53.5
410	7	8-53.3, 8-53.5
410	8	8-53.6
410	9	8-53.6 note
411	1, 2	163-72.1
411	3	163-129
411	4	163-153
411	5	163-169
412	1, 2	135-1
412	3	135-1.1
412	4-6	135-27
413	1, 2	14-288.8
414	. .	90-95
415	1-4	131E-175 note, 131E-177 note
416	1	58-44.6 Repealed
416	2	58-173.34 to 58-173.51 Repealed
416	3, 4	58-248.33
416	5	58-124.17
416	6	58-248.27
416	7	118-38
417	1	75-56
417	2	75-16.1
418	. .	153A-27.1
419	. .	105A-8
420	1	20-161.2 Repealed
420	2	20-219.9 to 20-219.14
420	3	115C-46
420	4	115D-21
420	5	116-44.4
420	6	116-229
420	7	143-340
420	8-10	153A-132
420	11-13	160A-303
420	14	20-219.9 note, 116-229 note
421	1	66-94.1
421	2	66-94
421	3	66-94.1 note
422	. .	44A-26 L.M.
424	. .	44-51.8
426	. .	20-79.2
427	1	10-1.1
427	2	10-1
427	3	10-1.1 note
432	. .	160A-397 L.M.
435	1	1-54 note, 8-35.1 note, 15A-534.2 note, 15A-931 note, 15A-1342 note, 18B-101 note, 18B-103 note, 18B-120 note, 18B-300 note, 18B-302 note, 18B-401 note, 18B-900 note, 18B-1003 note, 20-4.01 note, 20-12.1 note, 20-13.2 note, 20-16 note, 20-16.2 note, 20-16.3 note, 20-16.3A note, 20-16.4 note, 20-16.5 note, 20-17 note, 20-17.2 note, 20-17.3 note, 20-19 note, 20-23.2 note, 20-24 note, 20-26 note, 20-28.2 note, 20-138 note, 20-138.1 note, 20-138.3 note, 20-138.4 note, 20-139 note, 20-139.1 note, 20-140 note, 20-141.4 note, 20-168 note, 20-179 note,

Ch.	Sec.	1983 General Statutes
435	1	20-179.1 note,
		20-179.2 note,
		20-179.3 note
435	3	8-35.1
435	4	15A-534.2
435	5	15A-931
435	5.1	15A-1342
435	6	18B-103
435	7	18B-401
435	8	20-4.01
435	9	20-12.1
435	10	20-16
435	11	20-16.2
435	12	20-16.3
435	13	20-16.4
435	14	20-16.5
435	15	20-17
435	16	20-17.2
435	17	20-19
435	18	20-23.2
435	19	20-24
435	20	20-26
435	21	20-28.2
435	22	20-16.3A
435	23	20-138 Repealed,
		20-139 Repealed,
		20-140
435	24	20-138.1
435	25	20-138.4
435	26	20-139.1
435	27	20-141.4
435	28	20-168
435	29	20-179,
		20-179.1
435	30	20-179.2
435	31	20-179.3
435	32	18B-300,
		18B-302,
		18B-900
435	33	20-13.2
435	34	20-138.3
435	35	18B-302
435	36	20-17.3
435	37	18B-120 to
		18B-129
435	38	1-54
435	39	18B-900
435	40	18B-1003
435	41	18B-101
435	41.1, 42	1-54 note,
		8-35.1 note,
		15A-534.2 note,
		15A-931 note,
		15A-1342 note,
		18B-101 note,
		18B-103 note,
		18B-120 note,
		18B-300 note,
		18B-302 note,
		18B-401 note,
435	41.1, 42	18B-900 note,
		18B-1003 note,
		20-4.01 note,
		20-12.1 note,
		20-13.2 note,
		20-16 note,
		20-16.2 note,
		20-16.3 note,
		20-16.3A note,
		20-16.4 note,
		20-16.5 note,
		20-17 note,
		20-17.2 note,
		20-17.3 note,
		20-19 note,
		20-23.2 note,
		20-24 note,
		20-26 note,
		20-28.2 note,
		20-138 note,
		20-138.1 note,
		20-138.3 note,
		20-138.4 note,
		20-139 note,
		20-139.1 note,
		20-140 note,
		20-141.4 note,
		20-168 note,
		20-179 note,
		20-179.1 note,
		20-179.2 note,
		20-179.3 note
435	43	1-54 note,
		18B-120 note,
		18B-900 note,
		18B-1003 note
435	45	1-54 note,
		8-35.1 note,
		15A-534.2 note,
		15A-931 note,
		15A-1342 note,
		18B-101 note,
		18B-103 note,
		18B-120 note,
		18B-300 note,
		18B-302 note,
		18B-401 note,
		18B-900 note,
		18B-1003 note,
		20-4.01 note,
		20-12.1 note,
		20-13.2 note,
		20-16 note,
		20-16.2 note,
		20-16.3 note,
		20-16.3A note,
		20-16.4 note,
		20-16.5 note,
		20-17 note,
		20-17.2 note,

Ch.	Sec.	1983 General Statutes
435	45	20-17.3 note,
		20-19 note,
		20-23.2 note,
		20-24 note,
		20-26 note,
		20-28.2 note,
		20-138 note,
		20-138.1 note,
		20-138.3 note,
		20-138.4 note,
		20-139 note,
		20-139.1 note,
		20-140 note,
		20-141.4 note,
		20-168 note,
		20-179 note,
		20-179.1 note,
		20-179.2 note,
		20-179.3 note
435	45.1	20-16.5 note
435	46	1-54 note,
		8-35.1 note,
		15A-534.2 note,
		15A-931 note,
		15A-1342 note,
		18B-101 note,
		18B-103 note,
		18B-120 note,
		18B-300 note,
		18B-302 note,
		18B-401 note,
		18B-900 note,
		18B-1003 note,
		20-4.01 note,
		20-12.1 note,
		20-13.2 note,
		20-16 note,
		20-16.2 note,
		20-16.3 note,
		20-16.3A note,
		20-16.4 note,
		20-16.5 note,
		20-17 note,
		20-17.2 note,
		20-17.3 note,
		20-19 note,
		20-23.2 note,
		20-24 note,
		20-26 note,
		20-28.2 note,
		20-138 note,
		20-138.1 note,
		20-138.3 note,
		20-138.4 note,
		20-139 note,
		20-139.1 note,
		20-140 note,
		20-141.4 note,
		20-168 note
		20-179 note,
		20-179.1 note,
		20-179.2 note,

Ch.	Sec.	1983 General Statutes
435	46	20-179.3 note
436	. .	20-8
437	. .	40A-1 L.M.
438	. .	88-19
441	. .	153A-340
442	1	113A-118.1
442	2	113-229
443	1	20-7
443	2	20-37.7
443	3	20-14
446	1	75A-2,
		75A-4,
		75A-5, 75A-7,
		75A-8
446	2	75A-5, 75A-5.1,
		75A-7
446	3	75A-7
449	1, 2	39-13.6
450	1, 2	143-215.71
451	1	14-2.4
451	2	14-2.4 note
452	1, 2	135-38
453	1-3	15A-1340.4
454	1	48-1
454	2	48-7
454	3	48-9
454	4	48-9.1
454	5	48-16
454	6	48-1, 48-4, 48-7,
		48-9.2, 48-13,
		48-14, 48-20,
		48-23, 48-25,
		48-28, 48-29,
		48-31, 48-32
454	7	48-9.1
454	8	110-57.1
455	1	14-256
455	2	14-258.2
456	. .	160A-266
457	1	18B-403
457	2	18B-600
457	3	18B-1001
457	4	18B-605
458	. .	143-129 L.M.
459	. .	120-219.2 L.M.
460	1	15A-1009
460	2	15A-1004
460	3	15A-1009 note
461	. .	143B-392
463	. .	118-1 L.M.
465	1-5	148-45
466	. .	118-1 L.M.
467	. .	128-27, 135-5,
		135-62
468	1, 2	143-166, 143-166.01,
		143-166.02
468	3-6	143-166
468	7	143-166, 143-166.02,
		143-166.02 note
468	8	143-166.03
468	9	143-166.04
468	10	143-166

Ch.	Sec.	1983 General Statutes
468	11	143-166 note, 143-166.03 note, 143-166.04 note
469	1	135-68
469	2	135-68 note
470	1	54-110 note, 54-110.1, 54-110.1 note, 54-110.2 to 54-110.10
470	2	54-110.1 note
471	. .	8-53
472	. .	58-77
473	. .	47-30
475	. .	115C-67 L.M.
476	. .	66-58
477	1	115C-459
477	2	115C-459 note
478	. .	115C-271
479	1-3	115D-2.1
479	4	115D-3
480	. .	105-159.1
481	. .	105-159.1
482	. .	106-609
483	1-3	20-114.1
483	4	20-114.1 note
484	. .	113-138
485	1-3	113A-126
486	1-6	113A-104
486	7	113A-104 note
487	2	113-133.1
489	1	90A-45
489	2	90A-45 note
490	. .	160A-238 L.M.
491	. .	122-8.1
492	. .	113-291.1
493	1	115C-37.1
494	. .	143B-141 Repealed
495	1	90B-1 to 90B-13
495	2	8-53.7
495	3, 4	8-53.7 note, 90B-1 note
496	. .	118-7 L.M.
497	. .	118-1 L.M.
498	. .	118-1 L.M.
499	. .	135-40.2
500	1	118-41
500	2	118-42
501	. .	118-1 L.M., 118-6 L.M., 118-7 L.M.
502	1	1-42.9
502	2	1-42.9 note
503	. .	118-1 L.M.
504	. .	118-1 L.M.
505	1	118-1 L.M., 118-6 L.M., 118-7 L.M.
506	. .	128-21 L.M.
507	1	14-159.1
507	2	14-159.1 note
508	1, 2	14-151.1
509	1, 2	78A-17
509	3	78A-17 note
510	. .	105-164.4
511	1, 2	153A-149
511	3, 4	160A-209
512	. .	7A-289.32
513	1	15A-980
513	3	15A-1334
513	4	15A-1340.4
513	5	15A-980 note
515	1	147-69.3
515	2	93B-11
515	3	93B-11 note
516	1	126-40
516	2	126-40 note
517	. .	14-269.1
518	1	113A-113
518	2	113A-114 Repealed
518	3	113A-118
518	4, 5	113A-120
518	6	113A-126
519	1, 2	115C-527, 163-99
520	1	69-39.1
520	2	Ch. 69, Art. 5
520	3	69-39.1 note
521	1	20-7.1
521	2	20-37.9
521	3	20-37.9 note
522	1	41A-1 to 41A-10
522	2	143B-391
522	3	41A-1 note
523	. .	88-21
525	1-4	160A-167
525	5	162A-6
526	1	7A-29
526	2	7A-30
526	3	7A-31
526	4, 5	62-90
526	6	62-91
526	7	62-92
526	8	62-95
526	9	62-96
527	1	110-130.1
527	2	143B-153
527	3	110-130.1 note
528	1-3	90-112
529	. .	25-3-512
530	1	50-13.4
530	2	50-13.3
531	1	148-49.11
531	2	148-49.12
531	3	148-49.14
532	1	7A-610
532	2	7A-610 note
533	1	135-4
533	2	128-26
533	3	143-166
536	. .	15A-1344
537	. .	130-156.3 note
538	1, 2	20-13
538	3-5	20-16
540	1	143B-426.22, 143B-426.23
540	2	143B-426.22 note
541	. .	24-10
542	. .	66-49.9

Ch.	Sec.	1983 General Statutes
543	1, 2	143B-422
543	3	143B-424
544	1, 2	14-234
545	. .	20-9
546	. .	130-166.18 note
547	. .	15A-1380.2
548	. .	122-27
549	1	115C-90
549	2	115C-100
549	3	115C-90 note
551	. .	118-1 L.M., 118-5 L.M., 118-6 L.M., 118-7 L.M.
553	. .	163-67
554	1, 1.1	159-80
554	2-2.2	159-81
554	3-4	159-83
554	5	159-84
554	6	159-85
554	7, 8	159-86
554	9	159-88
554	10	159-89
554	11	159-90
554	12	159-91
554	13	159-93
554	14	159-94
554	15	159-95
554	16	159-96
554	17	159-120
554	18	159-141
554	19	159-160
554	20	159-165
554	21-26	159-80 note, 159-81 note, 159-83 note, 159-84 note, 159-85 note, 159-86 note, 159-88 note, 159-89 note, 159-90 note, 159-91 note, 159-93 note, 159-94 note, 159-95 note, 159-96 note, 159-120 note, 159-141 note, 159-160 note, 159-165 note
555	1	113-292 note
556	1, 2	128-24, 135-3
556	3	128-24 note, 135-3 note
557	1	148-4.1
557	2, 3	15A-1380.2
557	4	148-4.1 note
558	1	17E-1 to 17E-11
558	2, 3	17C-2
558	4	143A-55.2
558	5	120-123
558	6	17C-1 note,
558	6	17C-2 note, 17C-3 note
558	7	17E-1 note, 143A-55.2 note
559	1	143B-426.24
559	2	147-9.2
559	3	147-9.4
559	4	120-123
559	5	143B-426.24 note
560	1	15A-1355
560	2	15A-1340.7
560	3	148-13
561	1-6	15A-1343
561	7	15A-1342
561	8	15A-1343 note
562	. .	15A-1374
563	1	14-320.1
564	1-3	14-259
565	. .	105-345
567	1	15A-1344.1
567	2	15A-1343
567	3	15A-1343 note, 15A-1344.1 note
568	1	54-109.2
568	2	54-109.21
568	3	54-109.54
568	4	54-109.65
568	5	54-109.67
569	1, 2	87-21
570	1	113-151.1
570	2-7	113-152
570	8, 9	113-154
570	10	113-155 Repealed
570	11	113-156
570	12	113-157 Repealed
570	13	113-156.1
570	14	113-153
570	15	113-156
570	16	113-152, 113-154
570	17	113-158
570	18	113-162
570	19	113-164
570	20	113-165
570	21	105-164.13
570	22	113-152
570	23	113-156.1 note
571	1	15A-701
571	2	15A-703 note
571	3	15A-701
571	4	15A-702
572	. .	62-90
573	. .	115C-1 L.M.
574	1	159B-4
574	2-2.6	159B-5
574	3	159B-9
574	4, 4.1	159B-11
574	5	159B-12
574	6	159B-14
574	7, 7.1	159B-15
574	8	159B-16
574	9	159B-17
574	10	159B-27

Ch.	Sec.	1983 General Statutes
574	11	159B-4 note, 159B-5 note, 159B-9 note, 159B-11 note, 159B-12 note, 159B-14 note to 159B-17 note, 159B-27 note
575	. .	143B-450.1
576	1-3	163-96
576	4	163-74
577	1	113-315.31 note, 116-41.4 note, 116-41.9 note, 116-175 note, 116-175.1 note, 116-176 note, 116-178 note, 116-179 note, 116-182 note, 116-183 note, 116-187.1 note, 116-189 note, 116-191 note, 116-192 note, 116-194 note, 116-195 note
577	2	113-315.31
577	3	116-41.4
577	4	116-41.9
577	5	116-175.1
577	6	116-175, 116-176, 116-178, 116-179, 116-182, 116-183
577	7	116-187.1
577	8	116-189, 116-191, 116-192, 116-194, 116-195
577	19	113-315.25 note, 116-41.1 note, 116-175 note, 116-187 note, 143B-452 note
577	20	116-175.1 note, 116-187.1 note
578	1	131-28.22A note
579	. .	115C-518 L.M.
580	. .	113-1 L.M., 143-128 L.M.
581	1, 2	7A-289.27
581	3	7A-289.31
582	1	45-21.46, 45-21.47
582	2	1-601
582	3	1-601 note, 45-21.46 note, 45-21.47 note
583	1	18B-1000
583	2-5	18B-1001
583	6	18B-602
584	1-4	160A-362
585	1-11	96-9
585	12-16	96-12
585	17	96-13
585	18	96-14
585	19	96-16
585	20	96-8
586	1	7A-146
586	2	7A-148
586	3	15A-1011
586	4	7A-180
586	5	7A-273
587	. .	50-13.5
588	1	153A-272
588	2, 3	163-80
588	4	153A-272 note
589	1	84-16
589	2	84-16 note
590	1	7A-573
590	2-6	7A-574
591	1	105-436.1
591	2	105-449.16
591	3	105-449.24
591	4	105-436.1 note, 105-446.3:1 note, 105-449.16 note, 105-449.24 note
592	. .	20-108
593	1	20-84
593	2	20-84, 20-84.1
594	1	105-164.14
594	2	105-164.14 note
596	1	115D-20
596	2	115D-20 note
598	. .	25-2-103
599	. .	97-28
601	1-3	113-202
601	4	113-202 note
602	1	143-345.7
602	2	143-345.7 note
603	2	85B-4.1, 85B-4.2
603	3	85B-4.1 note, 85B-4.2 note
603	4	85B-4
603	5	85B-5
603	6	85B-8
603	7	85B-4.1 note, 85B-4.2 note
604	1	136-89.56
604	2	136-133
604	3	136-149
605	1	130-166.18 note
605	2	143B-216.10
606	. .	15A-1340.4
607	1	7A-659
607	2	7A-660
607	3	7A-289.31
607	4	7A-289.35 Repealed
607	5	7A-289.31 note, 7A-289.35 note, 7A-659 note, 7A-660 note
608	. .	130-128.2 note
609	1	Ch. 159B, Art. 1 note, Ch. 159B, Art. 2 note,

Ch.	Sec.	1983 General Statutes
609	1	Ch. 159B, Art. 3 note, Ch. 159B, Art. 4 note
609	2	159B-2
609	3-6	159B-3
609	7	159B-42 to 159B-46
609	8	159B-36 recodified as 159B-52, 159B-52
609	9	128-1
609	10	Ch. 159, Subch. III, Art. 3, Pt. 6 note
609	11	128-1 note, 159B-2, 159B-3 note, 159B-42 note, 159B-52 note
609	12	159B-42 note
610	1	20-279.7
610	2	20-279.31
610	3	20-279.7A
610	4	20-279.7A note
611	1	131D-3
611	2	131D-4
612	. .	110-91
613	1	50-5 Repealed, 50-5 note, 50-5.1
613	2	50-6
613	3	50-5 note, 50-5.1 note, 50-6, note
614	1	160A-417
614	2	153A-357
614	3	143-138
614	4	153A-325
614	5	143-138 note, 153A-325 note, 153A-357 note, 160A-417 note
614	6	153-325 note
615	. .	113-292
616	. .	136-44.20
617	1, 2	163-30
617	3	163-31
617	4	163-42
617	5	163-41
618	1, 2	17C-3
619	. .	113-221
620	. .	113-221
621	1	Ch. 113, Art. 16
621	2	113-201
621	3	113-201.1
621	4-16	113-202
621	17	113-201.1 note
622	1-3	166A-6.1
623	. .	14-358
624	1	47A-1 note, 47A-34 to 47A-37
624	2	47A-1 to 47A-5, 47A-7, 47A-12, 47A-13, 47A-16, 47A-17, 47A-19, 47A-27, 47A-28
624	3	47A-34 note
625	1	96-12
625	2-5	96-13
625	6	96-14
625	7	96-12
625	8	96-14
625	9	96-8
625	10-14	96-15
625	15	96-18
625	16	96-4
626	1	32A-1 to 32A-3, 32A-8 to 32A-14
626	2	47-115.1 Repealed
626	3	32A-1 note
627	1	115C-189
627	2	115C-191
628	1	97-110
628	2	97-117
629	1	18B-500
629	2	20-39
630	1	115C-12
630	2	115C-239
630	3-6	115C-240
630	7	115C-242
631	1	14-260 recodified as 162-55, 162-55, 162-55 note
631	2	14-261 recodified as 162-56, 162-56, 162-56 note
631	3	14-264 recodified as 162-57, 162-57, 162-57 note
632	1	143B-79
632	2	143B-80.1
632	3	143B-80.1 note
633	. .	14-277.2
635	. .	15A-1231
636	1	160A-49
636	2	160A-37
636	3	160A-49
636	4	160A-37
636	5	160A-49
636	6	160A-37, 160A-49
636	7	160A-47
636	7.1	160A-35
636	8	160A-33
636	9	160A-45
636	10	160A-47
636	11	160A-47
636	12-14	160A-49
636	14.1	160A-50
636	15	160A-48
636	16	160A-35
636	17	160A-47
636	17.1	160A-1
636	18	160A-35
636	19	160A-47
636	20	160A-37.1
636	21	160A-49.1
636	22	160A-37.2
636	23	160A-49.2
636	24	118-42

Ch.	Sec.	1983 General Statutes
636	25	160A-294
636	25.1	Ch. 160A, Art. 4A, Pt. 1
636	26	160A-24 to 160A-28 Repealed
636	26.1	160A-32 Repealed
636	27	160A-43 Repealed, 160A-44 Repealed, 160A-55 Repealed, 160A-56 Repealed
636	36	160A-37
636	37	160A-49
636	37.1, 38	118-42 note, 160A-1 note, 160A-24 to 160A-28 note, 160A-32 note, 160A-33 note, 160A-35 note, 160A-37 note, 160A-37.1 note, 160A-37.2 note, 160A-43 note, 160A-44 note, 160A-45 note, 160A-47 note, 160A-48 note, 160A-49 note, 160A-49.1 note, 160A-49.2 note, 160A-50 note, 160A-55 note, 160A-56 note, 160A-294 note
637	1	131D-5 Repealed
637	2	131D-10.1 to 131D-10.9
637	3	110-49 Repealed
637	4	131D-10.1 note
638	1	122-58.1
638	2	122-58.2
638	3-5	122-58.3
638	6, 7	122-58.4
638	8	122-58.5
638	9, 10	122-58.6
638	11	122-58.6A
638	12	122-58.7
638	13	122-58.7A:1
638	14	122-58.8
638	15	122-58.8A
638	16	122-58.10A
638	17	122-58.10B
638	18, 19	122-58.11
638	20	122-58.11A
638	21	122-58.13
638	22	122-8.1
638	23	7A-451
638	24	7A-451.1
638	25	7A-451 note, 7A-451.1 note, 122-8.1 note, 122-58.1 note, 122-58.2 note, 122-58.3 note, 122-58.4 note, 122-58.5 note, 122-58.6 note, 122-58.6A note, 122-58.7 note, 122-58.7A:1 note, 122-58.8 note, 122-58.8A note, 122-58.10A note, 122-58.10B note,
638	25	122-58.11 note, 122-58.11A note, 122-58.13 note
638	25.1	122-58.4
638	27	7A-451 note, 7A-451.1 note, 122-8.1 note, 122-58.1 note, 122-58.2 note, 122-58.3 note, 122-58.4 note, 122-58.5 note, 122-58.6 note, 122-58.6A note, 122-58.7 note, 122-58.7A:1 note, 122-58.8 note, 122-58.8A note, 122-58.10A note, 122-58.10B note, 122-58.11 note, 122-58.11A note, 122-58.13 note
639	1, 2	7A-576
640	1, 2	50-20
641	1	150A-2
641	2	150A-10 Repealed
641	3	150A-14
641	4	150A-58
641	5	150A-59
641	6	150A-63
641	7	120-30.24
641	8	143B-10
642	1	153A-309
642	2	153A-309 note
643	1, 2	105-275
643	3	105-275 note
644	1, 2	163-294.2
644	3	163-280
645	1, 2	97-10.2
645	3	97-10.2 note
646	1	14-163.1
646	2	14-163.1 note
648	1	11-7.1
648	2	11-7.1 note
649	. .	162-3 L.M., 162-5 L.M.
650	. .	105-113.86
651	1	128-1.2
651	2	128-1.2 note
652	1	159F-1 note
652	2	159F-1 to 159F-9
652	3	159F-1 note
653	1	14-318.4
653	2	14-322.1
654	. .	95-69.10
655	2	143B-153.1 note
656	1	115C-364
656	2	115C-81
657	1	65-36.1
657	2	65-36.2
657	3	65-36.3
657	4	65-36.2, 65-36.5, 65-36.6, 65-36.7
657	5	65-36.6
658	. .	159-7 L.M., 160A-33 L.M., 160A-45 L.M., 160A-58 L.M.

Ch.	Sec.	1983 General Statutes
659	. .	160A-216 L.M.
661	. .	58-79
662	. .	58-40
663	1	105-269.4
663	2	105-163.16
663	3	105-269.4 note
664	. .	58-79
665	1	1A-1, Rule 45
665	2	8-44.1
666	. .	143B-426.11
667	1	143B-279, 143B-302 to 143B-304 Repealed
667	2, 3	143B-280
668	1	58-254.57
668	2	58-254.57 note
669	. .	58-254.47
670	1	162-2
670	2	162-5, 162-5.1
670	3	Ch. 162, Art. 2
670	4	162-8
670	5	162-9
670	6	162-10
670	7	162-11 Repealed
670	8	162-14
670	9	162-15
670	10	162-17
670	11	162-18
670	12	162-20 Repealed
670	13	162-21 Repealed
670	14	162-22
670	15	162-24
670	16	162-37 Repealed
670	17	162-38
670	18	162-40
670	19	162-40.1
670	20	162-42 to 162-44 Repealed, 162-48 Repealed
670	21	162-50
670	22	105-373
670	23	14-243
670	24	162-40.1 note, 162-50 note
671	1	50-21
671	2	50-21 note
672	1	42-36.2
672	3	42-51
672	4	42-36.2 note
673	1	Ch. 74C, Art. 1, 74C-1 note
673	2	74C-30 to 74C-33
673	3	74C-8
673	4-6	74C-10
673	7	74C-12
673	8	74C-10
673	9	74C-20 Repealed
673	10	74C-30 note
674	1	126-11
674	2	126-11 note
675	. .	96-8
676	1	113A-205 to 113A-214
676	2	153A-448
676	3	160A-458.2
676	4	113A-205 note, 153A-448 note, 160A-458.2 note
677	1	50-13.9
677	2	50-13.9 note
678	1	15-187
678	2	15-188
678	3	15-190
678	4	15-187 note, 15-188 note, 15-190 note
679	1, 2	1A-1, Rule 4
680	. .	143-3.3
681	1	15A-505
681	2	15A-505 note
682	1	143B-262
682	2	143B-262 note
683	. .	67-31 L.M.
684	. .	136-84 to 136-87 Repealed
685	1	105-188
685	2	105-188 note
686	1	25A-1
686	2, 3	25A-2
686	4	25A-44
688	. .	48-11
689	1, 2	58-43
690	. .	58-248.33
691	1	20-279.4
691	2	20-279.5
691	3	20-279.4 note, 20-279.5 note
692	1	143-135.5
692	2	143-48
692	3	136-28.4
692	4	136-28.4 note, 143-135.5 note
693	. .	105-275
694	. .	14-239
695	1	90-89
695	2	90-90
696	. .	160A-75
697	. .	163-35
698	. .	160A-443
699	1	161-22
699	2	51-18
699	3	161-22
700	1-4	163-278.42
700	5	163-278.41
701	1	8C-1, Rules 101 to 1102
701	2	8C-1 note
701	3	8C-1 note
702	1-9	147-69.2
702	10	147-69.3
704	1	20-285
704	2, 3	20-286
704	4	20-294
704	5-10	20-305
704	11-13	20-305.1
704	14, 15	20-305.2
704	16	20-308.1
704	17	20-308.2
704	18	20-305.5

Ch.	Sec.	1983 General Statutes
704	19, 20	20-285 note, 20-286 note, 20-294 note, 20-301 note, 20-305 note, 20-305.1 note, 20-305.2 note, 20-305.5 note, 20-307.1 note, 20-308.1 note, 20-308.2 note
704	21	20-286
704	22	20-305 note
704	23	20-301
704	24	20-307.1
704	25	20-285 note, 20-286 note, 20-294 note, 20-301 note, 20-305 note, 20-305.1 note, 20-305.2 note, 20-305.5 note, 20-307.1 note, 20-308.1 note, 20-308.2 note
705	1	14-72.3
705	2	14-72.3 note
706	1	105-147
706	2	105-3
706	3	105-3 note, 105-147 note
707	. .	163-80
708	1	95-25.3
708	2	95-25.14
708	3	95-25.2
709	1	148-26.1, 148-26.2 to 148-26.4 Repealed
709	2	143B-265
709	3	143B-267
710	. .	143B-417
711	1	28A-25-3
711	2	28A-25-4
712	1	15A-1343
712	2	15A-1343 note
713	1	7A-320
713	2, 3	7A-304
713	4-6	7A-305
713	7, 8	7A-306
713	9	7A-306
713	10-17	7A-307
713	18	7A-308
713	19	7A-309
713	20	7A-314
713	21	28A-25-1
713	22	10-1
713	23	25-9-403
713	24, 25	25-9-405
713	26	25-9-406
713	27, 28	25-9-407
713	29-31	44-68.4
713	32-35	55-155
713	36	55-156
713	37	55-155
713	38	55-156
713	39-42	55A-77
713	43, 44	55A-78
713	45-47	78A-28
713	48	78A-37
713	49	80-3
713	50	120-47.3
713	51	120-47.2
713	52	95-105
713	53	95-106
713	54	20-88.01
713	55	105-449.37
713	56	105-449.47
713	57	105-449.48
713	58	105-449.49
713	59	105-449.51
713	60	105-449.52
713	61	20-87
713	62	105-2.1
713	63, 64	105-3
713	65	105-9.1
713	66	105-114
713	67	105-125, 105-212
713	68	105-130.2
713	69	105-130.3
713	70	105-130.5
713	71	105-130.5
713	72	105-130.5
713	73	105-130.5
713	74	105-130.12
713	75	105-135
713	76	105-141
713	77	105-147
713	78	105-147
713	79	105-163.1
713	80	105-212
713	81	105-228.5
713	82	105-3, 105-7, 105-7.1, 105-130.2, 105-130.5, 105-130.9, 105-130.13, 105-130.15, 105-135, 105-141, 105-141.2, 105-142, 105-144, 105-144.1, 105-144.2, 105-145, 105-147, 105-161, 105-163, 105-163.1, 105-212
713	83	105-130.5
713	84	105-147
713	85	105-141
713	86	105-163.25 to 105-163.37 note, 105-163.38 to 105-163.44
713	87, 88	105-164.3
713	89	105-164.4
713	90	105-164.6
713	91	105-164.13
713	92	105-164.13
713	93	105-164.4
713	94	20-109.1
713	95	105-164.44A
713	96	131E-177
713	97	131E-182
713	98	105-66
713	99	105-66.1
713	100, 101	18B-804
713	102 to 104	18B-805
713	105	18B-902
713	106	18B-903
713	107, 108	105-113.86
713	109	7A-304 note, 7A-305 note,

Ch.	Sec.	1983 General Statutes
713	109	7A-306 note, 7A-307 note, 7A-308 note, 7A-309 note, 7A-314 note, 7A-320 note, 20-87 note, 20-88.01 note, 105-2.1 note, 105-66.1 note, 105-163.25 to 105-163.37 note, 105-163.38 note, 105-147 note, 120-47.2 note, 120-47.3 note, 131E-177 note, 131E-182 note
714	1	104F-1
714	2	104F-2
714	2	104F-3
714	3	104F-4, 104F-5
714	4	104F-1 note
714	5	104F-1 note
715	1, 2	143B-480.2
715	3	143B-480.3
717	1	14-247 note, 18B-200 note, 20-2 note, 20-189 note, 20-196 note, 53-93.1 note, 53-96 note, 58-194.1 note, 58-241.6 note, 58-241.11 note, 62-15 note, 66-58 note, 86A-6 note, 90-139 note, 90-140 note, 95-69.13 note, 95-134 note, 96-3 note, 97-78 note, 106-26.20 note, 106-266.7 note, 113-315.26 note, 115C-27 note, 115C-243 note, 115D-3 note, 115D-4 note, 115D-5 note, 115D-33 note, 116-11 note, 116-36 note, 116-37 note, 116-168 note, 116-168.1 note, 116-169 note, 116-170 note, 116-209.19 note, 120-121 note, 120-122 note,
717	1	120-123 note, 122A-4 note, 122A-8.1 note, 123A-1 note, 126-3 note, 126-5 note, 126-8.1 note, 126-67 note, 129-40 note, 129-42 note, 129-42.1 note, 129-42.2 note, 136-4 note, 136-44.2 note, 136-44.37 note, 136-44.38 note, 138-4 note, 140-12 note, 143-11 note, 143-11.1 note, 143-16.1 note, 143-18.1 note, 143-25 note, 143-49 note, 143-52 note, 143-53 note, 143-56 note, 143-60 note, 143-63 note, 143-143.10 note, 143-215.40 note, 143-215.73 note, 143-243 note, 143-246 note, 143-341 note, 143-342.1 note, 143A-9 note, 143B-9 note, 143B-10 note, 143B-27 note, 143B-267 note, 143B-397 note, 143B-398 note, 143B-426.11 note, 143B-434 note, 143B-454 note, 143B-469.1 note, 146-30 note, 147-15 note, 147-86.1 note, 147-87 note, 148-70 note, 159-5 note
717	2	120-123
717	2.1	143B-452
717	3	120-123
717	4	18B-200
717	5	20-2
717	6	20-189
717	7	20-196
717	8	53-93.1
717	9	53-96

Ch.	Sec.	1983 General Statutes
717	10	58-194.1
717	11	58-241.6
717	12	58-241.11
717	12.1	62-15
717	13	66-58
717	14	148-70
717	15	86A-6
717	16	95-69.13
717	17, 18	95-134
717	19	96-3
717	20	97-78
717	21	106-26.20
717	22	106-266.7
717	24	113-315.26
717	25	115C-27
717	26	115D-3
717	27-27.2	115D-4
717	27.3	115D-33
717	28	115D-5
717	29, 30	116-11
717	31	116-36
717	32	116-37
717	33	116-168.1
717	34	116-168 note, 116-169 note, 116-170 note
717	35	116-209.19
717	36-37	122A-4
717	38	122A-8.1
717	39	123A-1 to 123A-27 Repealed
717	40	126-3
717	41	126-5
717	42	128-8.1
717	43	126-67
717	43.1	129-40
717	43.2	120-123
717	43.3, 43.4	129-42
717	43.5	129-42.1
717	44	129-42.2
717	45	136-4
717	46, 47	136-44.2
717	48	136-44.37, 136-44.38
717	49	138-4
717	50	143A-9
717	51	143B-9
717	52, 53	140-12
717	54	143-11
717	55	143-11.1 Repealed
717	56	143-16.1
717	57	143-18.1
717	58	143-25
717	60	143-49
717	61	143-52
717	62	143-49
717	63-64.1	143-53
717	65, 66	143-56
717	67, 68	143-60
717	69	143-215.40
717	70	143-215.73
717	71, 72	143-243
717	73	143-246
717	74	143-341
717	75	14-247
717	76, 77	143-342.1
717	78	143B-10
717	79	143B-27 Repealed
717	80	143B-267
717	81	143-63, 143B-397 Repealed, 143B-398 Repealed
717	82	143B-426.11
717	83	143B-434
717	84	143B-454
717	85	143B-469.1
717	86-87	146-30, 146-30 note
717	88	147-15
717	89	147-86.1
717	90	147-87
717	91	159-5
717	92	115C-243
717	93-98	106-266.7
717	99	120-123
717	100-104	90-139
717	105	120-123
717	106	90-104
717	107-109	143-143.10
717	110	120-123
717	111	120-121
717	112,113	120-122
717	114	143-143.10
717	115	116-168.1 note
718	1	122-23.1 to 122-23.10
718	2	90-109
718	3	122-35.51, 122-35.52
718	4	122-72
718	5	143B-147
718	6	90-109 note, 122-23.1 note, 122-35.51 note, 122-35.52 note, 122-72 note, 143B-147 note
718	7	122-23.1 note
719	1	24-9.2
719	2	54B-237 to 54B-242, 54B-245 to 54B-249
719	3	24-9.2 note
720	1	15-144.1
720	2, 3	15-144.2
720	4	14-12.7, 14-12.7 note, 14-12.9, 14-12.9 note, 14-12.10, 14-12.10 note, 14-27.2, 14-27.2 note, 14-27.4, 14-27.4 note, 14-33, 14-33 note, 14-190.8, 14-190.8 note, 14-316.1, 14-316.1 note, 14-318, 14-318 note
721	1	75-15.2
721	2	14-291.2
721	3	75-33
721	4	66-99
722	. .	1A-1, Rule 45
724	1	20-118
724	2	20-116

Ch.	Sec.	1983 General Statutes
725	. .	135-4
726	1	7A-450.1 to 7A-450.4
726	2, 3	7A-588
726	4	7A-450.1 note, 7A-450.2 note, 7A-450.3 note, 7A-450.4 note, 7A-588 note
727	. .	15A-131
728	. .	97-93
729	. .	163-213.4
730	. .	143-138 L.M., 160A-303 L.M.
731	. .	115C-518
732	. .	20-51
733	1	147-16.2
733	2	147-16.2 note
735	1	162A-89.1
735	2	162A-89.1 note
737	. .	90-278
738	1	45-21.46
738	2	45-21.46 note
739	1, 2	15-27.2
740	1, 2	18B-302
741	. .	14-107
742	3	85C-41 Repealed
742	4	85C-41 note
744	1.1	163-294.2 L.M.
745	1	17E-2
745	2	17C-2
745	3	17C-10
745	4	153A-216
745	5	153A-220
745	6	153A-221
745	7	153A-222
745	8	153A-223
745	9	153A-227 Repealed
746	1	14-43.2
746	2	14-39
748	. .	160A-265 L.M.
749	. .	58-205.3
750	1	115C-154
750	2	115C-159
750	3	115C-165
751	1	85B-1
751	2, 3	85B-2
751	4, 5	85B-3
751	6-8	85B-4
751	9-11	85B-5
751	12	85B-6
752	. .	115C-72
753	. .	20-162.1
754	. .	20-43.4
755	1	90-329 to 90-342
755	2	8-53.8
755	3, 4	8-53.8 note, 90-329 note
756	1	47-108.19
756	2	47-108.19 note
757	13	113A-134.1 to 113A-134.3
758	1-4	50-20
758	5	50-20 note
759	1-3	15A-903
760	1-4	105-436.1 note, 105-449.16 note, 105-449.24 note
761	13	143-10.1
761	14	143-27
761	19	143-7
761	21	58-191.4, 58-191.4 note
761	22	138-6
761	24	138-5
761	25	120-3.1
761	26	120-3.1
761	27	143-34.6
761	35	131D-3, 131D-4
761	55	131-60.6 note
761	57	143-16.1
761	58	143-341
761	60	90-85.27 note, 108A-61 note
761	77	115C-106 note, 122-35.53 note, 130A-5 note, 134A-1 note
761	88	115C-301.1
761	90	115C-302
761	93	115C-521, 115C-521 note
761	104	115D-2
761	105	115D-31.1
761	112	116-144
761	113	116-11
761	119	113-56.1
761	120	113A-193
761	133	18B-208
761	134	18B-208 note
761	135	136-28.1 note
761	138	62-281
761	140	20-63 note, 105-164.4 note
761	141	20-88.1, 20-88.1 note
761	142,143	20-87
761	144	20-88
761	145	20-87
761	146	20-309
761	147	20-311
761	148	20-48
761	149	20-26
761	151	143-341, 143-341 note
761	152	7A-400 to 7A-410 note, 7A-411, 7A-411 note, 7A-412, 7A-412 note, 7A-413, 7A-414
761	153	7A-49.3
761	154	20-179.4, 20-179.4 note
761	155	20-179.2
761	157	15A-1371 L.M.

Ch.	Sec.	1983 General Statutes
761	159	7A-586
761	160	7A-489, 7A-489 note, 7A-490 to 7A-493
761	162	50-13.1 L.M., 50-13.1 note
761	163	7A-478
761	165	122-98
761	166	146-30, 146-30 note
761	168	66-58
761	173,174	143-341
761	176,177	143-47.21
761	178	Ch. 143, art. 2D
761	179	120-123
761	180,181	143-47.24
761	184	115C-223
761	185	150A-11
761	187	143-135.10 to 143-135.20
761	188	7A-29
761	189	7A-31
761	190	143-135.3
761	191	136-29
761	192	136-29 note, 143-135.3 note, 143-135.10 note
761	194,195	147-11
761	197	120-37
761	199	7A-171.1
761	200	7A-101
761	203	120-3
761	206	58-6
761	207	95-2
761	208	106-11
761	209	114-7
761	210	115C-20
761	211	147-33
761	212	147-35
761	213	147-55 note
761	214	147-64.1
761	215	147-65
761	218,219	135-5
761	220	143-166
761	221	135-65
761	222	135-1 note
761	223	135-14
761	225	143-27.2 note
761	226,227	128-27
761	228,229	135-5
761	230	135-57
761	231	135-63
761	232	143-166
761	233	128-27 note, 135-5 note, 135-63 note
761	234	135-63
761	236	143-166.1
761	237	143-166.2
761	238	120-4.8 to 120-4.29
761	239	120-4.8 note
761	240	120-4.8 to 120-4.29 note
761	241	143-166
761	242	7A-10
761	243	7A-18
761	244	7A-44
761	245	7A-144
761	246	7A-65
761	247	7A-101
761	248	7A-65
761	249	7A-101
761	250,251	127A-40
761	252-255	135-40.2
761	256	135-40.3
761	257	143-1 note
761	259	7A-10 note, 7A-18 note, 7A-29 note, 7A-31 note, 7A-44 note, 7A-49.3 note, 7A-65 note, 7A-101 note, 7A-144 note, 7A-171.1 note, 7A-411 note, 7A-478 note, 7A-489 note, 7A-586 note, 18B-208 note, 20-26 note, 20-48 note, 20-63 note, 20-87 note, 20-88 note, 20-88.1 note, 20-179.2 note, 20-179.4 note, 20-309 note, 20-311 note, 58-6 note, 58-191.4 note, 62-281 note, 66-58 note, 95-2 note, 105-164.4 note, 106-11 note, 113-56.1 note, 113A-193 note, 114-7 note, 115C-20 note, 115C-106 note, 115C-223 note, 115C-301.1 note, 115C-302 note, 115C-521 note, 115D-2 note, 115D-31.1 note, 116-11 note, 116-144 note, 120-3 note, 120-3.1 note, 120-4.8 to 120-4.29 note, 120-37 note, 120-123 note, 122-98 note 127A-40 note,

Ch.	Sec.	1983 General Statutes
761	259	128-27 note, 131D-3 note, 131D-4 note, 135-5 note, 135-14 note, 135-40.2 note, 135-40.3 note, 135-57 note, 135-63 note, 135-65 note, 136-28.1 note, 136-29 note, 138-5 note, 138-6 note, 143-7 note, 143-10.1 note, 143-16.1 note, 143-27 note, 143-27.2 note, 143-34.6 note, 143-47.21 note, 143-47.24 note, 143-135.3 note, 143-135.10 note, 143-166 note, 143-166.1 note, 143-166.2 note, 143-341 note, 146-30 note, 147-11 note, 147-33 note, 147-35 note, 147-55 note, 147-64.1 note, 147-65 note, 150A-11 note
761	260	7A-411 note, 113-56.1 note, 115C-301.1 note, 115D-31.1 note, 138-5 note, 138-6 note, 143-10.1 note, 143-34.6 note
762	1	15A-401
762	2	15A-401 note
763	1	58-30.5
763	2, 3	58-30.4
763	4	58-30.5 note
765	1-4	N.C. Const., Art. V, § 11 note
766	. .	58-241.34
768	1	1-515
768	2	14-86.1
768	3	20-17.1
768	4	20-88
768	5	20-125
768	5.1	90-322
768	5.2	105-3
768	6	20-130.1
768	7	115C-115
768	8	115C-242
768	9	115C-302
768	10	115C-569
768	11	116-36.3
768	12	120-30.28 note
768	13	143A-42
768	14	143A-43 Repealed, 143A-46 Repealed
768	15	143A-44
768	16	143A-45
768	17	143A-47
768	18	143A-48
768	19	150A-14
768	20	153A-221
768	21	153A-221.1
768	22	160A-91
768	23	160A-240.1
768	24	164-15
768	25	160A-49
768	25.1, 25.2	18B-500, 20-39
768	25.3	20-43.4, 20-43.4 note
769	1	157-9.1
769	2	157-9.1 note
770	1-15	115C-325
770	16	115C-306 Repealed
770	17	115C-325 note
772	1	97-38
772	2	97-38 note
773	. .	90-108
774	1	7A-400 to 7A-410 Repealed
774	2	7A-506
775	1	130-1 to 130-3 note, 130-9.5 Repealed, 130-9.7 Repealed, 130-170.1 Repealed, 130-170.2 Repealed, 130-230 Repealed, 130-232 to 130-235 Repealed, 130-264 to 130-277 Repealed, 131-1 to 131-188 Repealed, 131B-1 to 131B-9 Repealed, 131E-1, 131E-5 to 131E-12, 131E-15 to 131E-34, 131E-40 to 131E-47, 131E-55 to 131E-58, 131E-65 to 131E-67, 131E-70, 131E-75 to 131E-82, 131E-85 to 131E-87, 131E-90, 131E-95, 131E-100 to 131E-110, 131E-115 to 131E-128, 131E-135 to 131E-142, 131E-145 to 131E-152, 131E-155 to 131E-161, 131E-165 to 131E-170,

Ch.	Sec.	1983 General Statutes
775	1	131E-175 to 131E-191
775	2	131E-175 note
775	3	131-4 to 131-13 note, 131E-5 note, 131E-15 note, 131E-40 note
775	4-6	130-1 to 130-3 note, 130-9 to 130-9.4 note, 130-9.5 note, 130-9.7 note, 130-170.1 note, 130-170.2 note, 130-230 note, 130-232 to 130-235 note, 130-264 to 130-277 note, 131-4 to 131-13 note, 131B-1 to 131B-9 note, 131E-1 note
775	7	130-1 to 130-3 note, 130-9 to 130-9.5 note, 130-9.7 note, 130-170.1 note, 130-170.2 note, 130-230 note, 130-232 to 130-235 note, 130-264 to 130-277 note, 131-4 to 131-13 note, 131B-1 to 131B-9 note, 131E-1 note, 131E-15 note
776	1	8-58.1
776	2	8-58.1 note
777	1, 2	20-279.21
777	3	20-279.21 note
778	1	147-33.12 to 147-33.21
778	2	120-123
778	3	147-33.12 note
778	4	147-33.12 note
779	1	20-217
779	2	20-217.1 Repealed
779	3	20-217 note, 20-217.1 note
780	1	14-219 Repealed
780	2	120-86
780	3	14-219 note, 120-86 note
781	. .	114-26 to 114-37 Repealed
782	1	135-27
784	. .	7A-39.3, 7A-52
785	1	105-302
785	2	105-306
786	1	74D-1 to 74D-13
786	2, 3	74C-3
786	4, 5	74C-1 note, 74D-1 note
786	6, 7	74C-10 note, 74D-9 note
786	8	74D-1 note
786	9	120-123
786	10	74D-1 note
788	. .	18B-700 L.M.
789	1	122B-1 to 122B-29
789	2	120-123
789	3	120-123 note, 122B-1 note
790	1-4	105-228.7
790	5	57-12
790	6	58-63
790	7-9	66-49.11
790	10	66-49.31
790	11	85C-12
792	. .	105-113.96
793	1	105-130.34
793	2	105-130.9
793	3	105-151.12
793	4	105-147
793	5	105-130.34 note, 105-147 note, 105-151.12 note
794	1	74C-3
794	2	74C-5
794	3	74C-8
794	4	74C-10
794	5	74C-16
794	6	74C-17
794	7	74C-4
794	8	74C-9
794	9	14-401.6
794	10	74C-4 note
794	11	74C-8
795	1	130A-290
795	2	130A-291
795	3	130A-294
795	4	143-129.2
795	5	159-96
795	6	159-97
795	7	150-96 note, 159-97 note
795	8	130A-290 note, 130A-291 note, 130A-294 note, 143-129.2 note, 159-96 note, 159-97 note
795	8.1	130A-290, 130A-290 note, 130A-291, 130A-291 note, 130A-294, 130A-294 note, 143-129.2
795	9	143-129.2 note

Ch.	Sec.	1983 General Statutes
796	. .	160A-265 L.M.
797	1, 2	160A-457
798	. .	20-16
799	. .	45-21.33
800	1, 2	106-272
800	3	106-274
801	1, 2	1A-1, Rule 30
802	1, 2	58-41.2
802	3	66-49.18
802	4	58-41.1
804	1, 2	143-134.1
804	3	143-134.1 note
805	1, 2	105-164.4
806	. .	143-119
807	1, 2	17C-3
807	3	17C-5
807	4	17C-9
808	1	105-369
808	2-4	105-370 to 105-372 Repealed
808	5-7	105-373
808	8	105-374
808	9	105-375
808	10, 11	105-394
808	12	105-369 note, 105-370 to 105-372 note, 105-373 note to 105-375 note, 105-394 note
808	13	105-369 note, 105-370 to 105-372 note, 105-373 note to 105-375 note, 105-394 note
810	. .	74C-5
811	1	50-20 note
812	. .	136-113
813	1	105-289
813	2	105-294
813	3	105-296
813	4	105-299
814	1	93A-39 to 93A-57
814	2	93A-39 note, 93A-51 note to 93A-53 note
815	1	105-251.1
815	2	105-251.1 note
815	3	105-251.1 note
816	1	131D-21.1
816	2	131D-21.1 note
817	1-3	78A-2
817	4, 5	78A-16
817	6, 7	78A-17
817	8	78A-36
817	9, 10	78A-37
817	11-15	78A-39
817	16	78A-40
817	17	78A-45
817	18	78A-47
817	19	78A-48
817	20, 21	78A-56
818	. .	44A-26
819	. .	125-2
820	1	162A-6
820	2	162A-9.1
820	3	162A-9.1 note
821	. .	105-277.3
822	1	25C-1 to 25C-5
822	2	25C-1 note
823	. .	105-360 L.M.
824	1	131D-2
824	2, 3	131D-2, 131D-20
824	4	131D-2
824	5	131D-2, 131D-20
824	6	131D-2
824	7, 8	131D-2, 131D-20
824	9-12	131D-2
824	13	131D-21
824	14	131D-22
824	15, 16	131D-26
824	17, 18	131D-30
824	19	131D-33 Repealed
826	. .	105-277.3
827	. .	160A-63
828	. .	160A-209
829	. .	40A-42 L.M.
831	1	58-54.4
832	1	15B-1 to 15B-22
832	2	120-123
832	3	143B-475
832	4	15B-3 note
832	6	15B-1 note, 120-123 note, 143B-475 note
833	. .	97-2
834	. .	67-32 note
835	1, 2	131E-100 note, 131E-175 note
837	1	7A-523
837	2, 3	7A-650
839	1	143-345.8
839	2	143-345.8 note
840	1, 2	143B-481
840	3	143B-483
842	. .	147-45
844	1	147-54.8 to 147-54.10
844	2	147-54.8 note
844	4	147-54.8 note
848	. .	20-81.3
850	1	114-4.2F
850	2	114-4.2F note
854	1	163-81
854	3	163-81 note
855	1, 2	105-375
855	3	105-375 note
857	. .	150A-13
859	. .	143B-216.12
863	. .	120-58
864	4	7A-451, 7A-451 note, 7A-451.1, 7A-451.1 note, 122-8.1, 122-8.1 note, 122-58.1,

Ch.	Sec.	1983 General Statutes
864	4	122-58.1 note, 122-58.2, 122-58.2 note, 122-58.3, 122-58.3 note, 122-58.4, 122-58.4 note, 122-58.5, 122-58.5 note, 122-58.6, 122-58.6 note, 122-58.6A, 122-58.6A note, 122-58.7, 122-58.7 note, 122-58.7A:1, 122-58.7A:1 note, 122-58.8, 122-58.8 note, 122-58.8A, 122-58.8A note, 122-58.10A, 122-58.10A note, 122-58.10B, 122-58.10B note, 122-58.11, 122-58.11 note, 122-58.11A, 122-58.11A note, 122-58.13, 122-58.13 note
865	1	105-163.16
865	2	105-130.35
865	3, 4	105-130.35 note, 105-163.16 note
865	5	105-130.35 note
866	1	143-168
866	2	143-169
866	3-5	143-169.1
866	6, 7	143-170.1
866	8	143-168 note, 143-169 note, 143-169.1 note, 143-170.1 note
867	1	111-27.1
867	2	126-5
867	3	135-16.1
867	4	135-40.2
867	5	135-34
870	1	7A-289.24
870	2	7A-289.29
870	3	7A-289.33
871	1	126-64, 126-65, 126-66, 126-67, 126-68
871	2	126-64 note
871	3	120-123
872	1	115C-272
872	2	115C-285
872	3, 4	115C-302
872	5-7	115C-316
872	8-10	115C-272 note, 115C-285 note, 115C-302 note, 115C-316 note
873	. .	105-164.13
874	1	148-121
874	2	148-121 note
881	2, 3	7A-312
881	4	7A-306
881	5	7A-133
883	1	150A-9 note
883	2	143B-153.1 Repealed
883	3	150A-9 note
884	1	72-49 note, 130A-250
884	2	130A-250, 130A-250 note
887	. .	105-164.13
888	. .	44A-12
889	1, 2	122-56.7
890	. .	14-399
891	1	130-1 to 130-285 Repealed
891	2	130A-1 to 130A-11, 130A-17 to 130A-28, 130A-34 to 130A-42, 130A-47 to 130A-84, 130A-88, 130A-90 to 130A-120, 130A-124, 130A-127, 130A-128, 130A-133 to 130A-147, 130A-152 to 130A-157, 130A-160 to 130A-166, 130A-171 to 130A-174, 130A-177 to 130A-179, 130A-184 to 130A-190, 130A-192 to 130A-200, 130A-205 to 130A-215, 130A-220 to 130A-223, 130A-227 to 130A-231, 130A-235 to 130A-244, 130A-247 to 130A-258, 130A-261 to 130A-279, 130A-290 to 130A-305, 130A-311 to 130A-327, 130A-333 to 130A-339, 130A-346 to 130A-349, 130A-352 to 130A-358, 130A-361, 130A-366, 130A-371 to 130A-374, 130A-377 to 130A-394, 130A-398 to 130A-418
891	3	90-216.6 to 90-216.11 Repealed
891	4	90-216.12 Repealed
891	5	90-217 to 90-220 Repealed
891	6	90-220.1 to 90-220.11 Repealed
891	7	72-46 to 72-49 Repealed
891	8	106-364 to 106-387 Repealed
891	9	67-32 Repealed
891	10	143B-209 Repealed
891	11	90-187.10
891	12	106-141
891	13	105-164.14
891	14	130A-35 note
891	15	143B-142
891	16	67-32 note
		72-46 to 72-49 note, 90-187.10 note, 90-216.6 to 90-216.11 note, 90-216.12 note, 90-217 to 90-220 note, 90-220.1 to 90-220.11 note, 105-164.14 note,

Ch.	Sec.	1983 General Statutes
891	16	106-141 note, 106-364 note, 130-1 to 130-3 note, 130A-1 note, 143B-142 note, 143B-209 note
891	16.1	130-1 to 130-3 note, 130A-1 note, 130A-55.1 note, 130A-270 note
891	17	130-1 to 130-3 note, 130A-1 note, 130A-185 note
893	. .	14-234 L.M.
894	1	110-147 to 110-150
894	2, 3	161-10
894	4	161-11.1
894	6	110-147 note, 161-11.1 note
895	. .	105-141
896	1	14-289, 14-290, 14-291, 14-291.1, 14-292
896	2	14-292.1 Repealed
896	3	14-309.5 to 14-309.14
896	4	18B-308
896	4.1	105-66
896	5	18B-1000
896	5.1, 6	14-289 note, 14-290 note, 14-291 note, 14-291.1 note, 14-292 note, 14-292.1 note, 14-309.5 note to 14-309.14, 18B-308 note, 18B-1000 note, 105-66 note
896	7	14-309.5 note
897	1	90-178.1 to 90-178.7
897	2	90-18, 90-172 Repealed, 130-112 Repealed
897	3	90-18 note, 90-172 note, 90-178.1 note, 130-112 note
898	1	20-115.1
898	2	20-115.1 note
899	1	143B-433
899	2	143B-471 to 143B-471.5
899	3	120-123
899	7	143B-471 note
900	1	120-129 to 120-134
902	1	135-5
902	2, 3	135-5 note
905	7	120-30.17
905	10, 11	124-5
906	. .	118-1 L.M.
907	2	50-13.9 note
907	3	143B-426.22 note
908	1	105-480 to 105-494
908	2	159-6
908	4	160A-456
908	45	105-480 note, 105-488 note
909	1	143B-500 to 143B-507
909	3	143B-500 note
912	1	20-166
912	2	20-182 Repealed
913	1	147-55 Repealed, 147-56 Repealed, 147-58 Repealed
913	2	147-64.1 to 147-64.14
913	3	7A-11
913	4	7A-20
913	5	7A-108
913	6	20-183.20
913	7	58-191
913	8	86A-7
913	9	88-15
913	10	90-281
913	11	93B-4
913	12	105-267.1
913	13	106-335
913	14	113-315.35
913	15	114-2
913	16	115C-29
913	17	115C-447
913	18	115D-58.5
913	19	116-36.1 to 116-36.3
913	20	116-209.14
913	21	123A-23
913	22	126-64
913	23	130A-270
913	24	135-39.1
913	25	136-10
913	26	137-31.5
913	27	138-6
913	28	140-8
913	29	140-13
913	30	142-30 to 142-54 Repealed
913	31	143-20
913	32	143-20.1
913	33	143-106 Repealed
913	34	143-127
913	35	143-154
913	36	143-155 Repealed
913	37, 38	143-166
913	39	143-203 Repealed
913	40	143B-74.1
913	41	143B-410
913	42	143B-428.18
913	43	143B-464
913	44	147-6
913	45	147-11
913	46	147-12
913	47	147-16
913	48	147-31 Repealed
913	49	147-62 recodified as 143-3.3, 143-3.3
913	50	147-63 recodified as 143-3.4, 143-3.4

Ch.	Sec.	1983 General Statutes
913	51	147-64 recodified as 143-3.4, 143-3.4
913	52	147-68
913	53	147-76
913	54	147-84
913	55	147-85
913	56	163-107
913	57	143-3.3 note, 143-3.4 note, 143-20.1 note, 147-64.1 note
916	1	14-318.4
916	2	14-190.6
916	3	14-190.12
916	4	14-190.12 note
917	1	18B-301
918	1	6-19.1, 6-19.2
918	2	6-19.1 note, 6-19.2 note
919	1	150A-46.1
919	2	150A-50
919	3	150A-47
919	4	150A-51
919	5	150A-46.1 note
920	2	131E-183
922	1	135-39
922	2	135-39.5
922	3	135-39.4
922	4	135-40.1
922	5	135-40.2
922	6	135-40.3
922	7	135-40.5
922	8-14	135-40.6
922	15	135-40.7
922	16	135-40.8
922	17	135-40.11
922	18	135-40.13
922	19-21	135-40.11
922	21.1, 21.2	135-40.1
922	21.3	135-40.6
922	21.4	135-40.7
922	21.5	135-40.6
922	21.6	135-40.12
922	21.7	135-40.1
922	21.8	135-40.4
922	21.9	135-40.6
922	21.10	135-37
922	21.11	105A-2
922	21.12	135-40.12 note
922	22	135-40.12 note
923	203	122A-5.7
923	205	143B-426.25, 143B-426.26
923	217	7A-171.1, 14-309.7, 14-309.8, 20-63 note, 20-88.1, 50-5 note, 50-5.1 note, 105-164.4 note, 120-4.14, 120-4.15, 120-32.5, 120-32.5 note, 138-5, 138-5 note, 138-6, 138-6 note, 143-27.2 note, 143-341,
923	267	105-164.4 note, 122A-5.7 note, 143B-426.25 note,
925	1	130-128
925	2	130A-55
927	1	Ch. 143B, Art. 1, Pt. 1 note, 143B-29.1 to 143B-29.5
927	2	120-30.24 to 120-30.28 Repealed, 120-30.29A Repealed, 120-30.32 Repealed, 120-30.34 to 120-30.40 Repealed
927	3	150A-12
927	4	150A-13
927	5	150A-59
927	6	150A-60
927	7	150A-12
927	8	150A-13
927	9	150A-60
927	10	150A-63.1
927	11	143B-14
927	13	150A-1
927	14	Ch. 143B, Art. 1, Pt. 2 note
929	1	105-130.26, 105-151.5

SESSION LAWS 1983, EX. SESS.

Ch.	Sec.	General Statutes
5	. .	18B-302
6	1	15A-903
6	2	15A-908
6	3	15A-910

(5) TABLE TRANSFERRING SECTIONS OF THE REVISAL OF 1905 AND PELL'S REVISAL INTO SECTIONS OF THE CONSOLIDATED STATUTES.

In using this table refer to Appendix XI, (2), where sections of the Consolidated Statutes have been transferred to sections appearing in the General Statutes of North Carolina. (This sentence is set out to correct an error in the Replacement Volume. — Ed. note.)

(6) Table of Comparable Sections For Chapters 153A and 153.

(Prepared by the Institute of Government.)

Chapter 153A Sec.	Chapter 153 Sec.
153A-1	New
153A-2	New
153A-3	New
153A-4	New
153A-5	New
153A-10	New
153A-11	153-1
	153-2
	153-9(34)
153A-12	153-1
153A-13	153-2.1
153A-14	New
153A-17	New
153A-18	153-11
153A-19	153-9(27)
153A-20	New
153A-21	153-5.1 through
	153-5.8
153A-25	New
153A-26	153-7, 153-9(11)
153A-27	153-6
153A-28	153-13
153A-29	153-9(11)
153A-34	153-4
	153-5
153A-39	153-8
153A-40	153-8
153A-41	153-8
153A-42	153-41
153A-43	153-8
153A-44	153-8
153A-45	153-9(55)
153A-46	New
153A-47	New
153A-48	153-9(55)
153A-49	New
153A-50	New
153A-52	New
153A-58	153-16
153A-59	153-16
153A-60	153-17
153A-61	153-17
153A-62	153-17
153A-63	153-17
153A-76	New
153A-81	153-20
	153-23
153A-82	153-21
	153-22
153A-83	New
153A-84	New
153A-87	New
153A-88	New
153A-89	New
153A-92	153-23, 153-48.1
	153-48.2
	153-48.3
153A-93	New
153A-94	153-9(49)
153A-95	New
153A-96	New
153A-97	153-9(48)
153A-101	153-9(2½), 153-26
153A-102	153-48.1
	153-48.2
153A-103	153-48.1
	153-48.3
153A-104	153-9(10)
153A-111	153-40
	153-41
153A-114	New
153A-121	153-9(55)
153A-122	153-9(55)
153A-123	New
153A-124	New
153A-125	153-9(20a)
153A-126	New
153A-127	New
153A-128	New
153A-129	New
153A-130	New
153A-131	New
153A-132	153-9(54a)
	153-9(54b)
153A-133	New
153A-134	153-9(21)
153A-135	153-9(55)
153A-136	153-10.1
	153-272
153A-137	New
153A-146	153-9(2)
153A-147	New
153A-148	New
153A-149	New
153A-150	153-64.1
153A-151	New
153A-152	New
153A-153	New
153A-154	New
153A-158	153-2, 153-9(15)
153A-159	153-9(57)
	153-284

Chapter 153A Sec.	Chapter 153 Sec.
153A-160	New
153A-161	New
153A-162	New
153A-163	153-9(15)
153A-164	153-54 through 153-58
153A-165	New
153A-169	153-2, 153-9(8), (9), (13) 153-26, 153-28
153A-170	153-9(54)
153A-176	153-2, 153-9(14)
153A-177	153-3
153A-185	153-294.1 153-326
153A-186	153-294.2 153-327
153A-187	153-294.3
153A-188	153-294.4
153A-189	New
153A-190	153-294.5 153-328
153A-191	153-294.6 153-329
153A-192	153-294.7 153-330
153A-193	153-294.8 153-331
153A-194	153-294.9 153-332
153A-195	153-294.10 153-333
153A-196	153-294.11 153-334
153A-197	153-294.12 153-335
153A-198	153-294.13 153-336
153A-199	153-294.14 153-337
153A-200	153-294.15 153-338
153A-201	153-294.17 153-340
153A-202	153-294.16 153-339
153A-203	153-294.16 153-339
153A-204	153-294.16 153-339
153A-211	153-9(64)
153A-212	New
153A-216	153-49
153A-217	153-50
153A-218	153-9(16) 153-9(25)
153A-219	153-53.7
153A-220	153-51
153A-221	153-52
153A-222	153-53
153A-223	153-53.1
153A-224	153-53.2
153A-225	153-53.3
153A-226	153-53.4
153A-227	153-53.5
153A-228	153-53.6
153A-233	153-9(39)
153A-234	153-9(39a)
153A-235	153-9(39b)
153A-239	New
153A-240	153-9(45)
153A-241	153-9(17)
153A-242	153-9(66)
153A-243	153-9(19)
153A-247	New
153A-248	153-9(59) 153-9(60) 153-11.3
153A-249	153-9(24)
153A-250	153-9(58)
153A-255	153-9(23)
153A-256	153-153 153-154 153-155
153A-257	153-159
153A-261	New
153A-262	153-250.13
153A-263	153-250.1 153-250.10
153A-264	153-250.2
153A-265	153-250.3
153A-266	153-250.6 153-250.12
153A-267	153-250.6
153A-268	New
153A-269	153-250.11
153A-270	153-250.4 153-250.5
153A-271	New
153A-274	153-9(46) 153-11.2 153-273 153-284
153A-275	153-9(46) 153-11.2 153-273 153-284 153-285 153-286.1
153A-276	New
153A-277	153-286
153A-278	153-287 153-288
153A-283	153-285
153A-284	153-294.18
153A-285	153-291
153A-286	153-292
153A-287	153-293
153A-288	153-294
153A-291	153-275.1

Chapter 153A Sec.	Chapter 153 Sec.
153A-292	153-274
153A-320	153-266.1
	153-266.13
	153-344
153A-321	153-9(40)
153A-322	153-9(40)
153A-323	153-266.2
	153-266.16
153A-324	153-266.18
153A-330	153-266.1
153A-331	153-266.3
153A-332	153-266.4
153A-333	153-266.5
153A-334	153-266.6
153A-335	153-266.7
153A-340	153-266.10
153A-341	153-266.12
153A-342	153-266.11
	153-266.13
153A-343	New
153A-344	153-266.14
	153-266.15
153A-345	153-266.17
153A-346	153-266.19
153A-347	153-266.21
153A-350	New
153A-351	153-342
	153-9(47)
	153-9(47a)
	153-9(52)
153A-352	153-343
	153-9(47)
	153-9(47a)
	153-9(52)
153A-353	153-345
	153-9(47a)
	153-9(52)
153A-354	153-346
	153-9(47)
	153-9(47a)
	153-9(52)
153A-355	153-347
	153-9(47)
	153-9(47a)
153A-356	153-348
153A-357	153-349
153A-358	153-350
153A-359	153-351
153A-360	153-352
153A-361	153-353
153A-362	153-354
153A-363	153-355
153A-364	153-356
153A-365	153-357
153A-366	153-358
153A-367	153-359
153A-368	153-360
153A-369	153-361
153A-370	153-362
153A-371	153-363
153A-372	153-364
153A-373	153-365
153A-374	153-366
153A-375	153-367
153A-391	153-276
153A-392	153-276
153A-393	153-276
153A-394	153-277
153A-395	153-278
	153-280
	153-281
153A-396	153-279
153A-397	153-279
153A-398	153-282
153A-401	New
153A-402	New
153A-403	New
153A-404	New
153A-405	New
153A-435	153-9(44)
153A-436	153-9.1 through
	153-9.7
	153-15.1 through
	153-15.6
153A-437	153-247 through
	153-250
153A-438	153-9(56)
153A-439	153-9(35)
153A-440	153-9(35½)
153A-441	153-1, 153-2
153A-442	New
153A-443	New
153A-444	New
153A-445	New

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Raleigh, North Carolina

November 1, 1983

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing 1983 Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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